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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969

No. 185

AUGIE REETZ, Commissioner of Fish and Game for Alaska, et al.,
Appellants,

vs.

JOHN BOZANICH, et al.,
Appellees.

Appeal from the United States District Court for the District of Alaska

Filed May 31, 1969
Probable Jurisdiction Dated October 13, 1969

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Plaintiffs' Amended Complaint	Filed February 14, 1969
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Defendants' Motion to Dismiss or in the alternative to stay proceedings	Filed September 16, 1968
Defendants' Motion for Summary Judgment and suggestion of mootness	Filed November 6, 1968
Affidavit of Augie Reetz	Filed November 6, 1968
Plaintiffs' Motion for Summary Judgment, without exhibits	Filed December 2, 1968
Letter of former Attorney General Edgar Paul Boyko dated 2/16/68 (with copies of regulations attached)	Filed December 2, 1968
Letter of Edgar Paul Boyko dated 2/16/68	Appellants' Opposition to Appellees' Motion to dismiss and/or affirm
Interrogatories propounded to Defendants	Filed January 6, 1969
Defendants' answer to interrogatories	Filed January 20, 1969
Plaintiffs' notice of renewal of Motion for Preliminary Injunction	Filed January 20, 1969
Affidavit of Robert Boochever	Filed January 20, 1969
Opinion	Filed February 26, 1969
Decree	Filed March 20, 1969
Selected Additional Alaska Commercial Fishing Regulations and Statutes	Appellees' Motion to Dismiss and/or affirm

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Appendix

DOCUMENTS

United States District Court for the
District of Alaska
Juneau, Alaska

John Bozanich, Andy Ness, Rudolph Plancich, Alan Takalo and William White, Plaintiffs, vs. Augie Reetz, Commissioner of Fish and Game for the State of Alaska; Robert Moss, Chairman; and Mike Uttecht, Harry A. Shawback, Frank Cook, Don Harris, Don Smith, Glenn DeSpain, J. Ellsworth Jensen and Gordon Jensen, Members of the Board of Fish and Game for the State of Alaska, Defendants.	No. J-5-68

AMENDED COMPLAINT

Come Now the above-named plaintiffs, and for their cause of action against the defendants, allege as follows:

1. This is an action for a declaratory judgment under 28 U.S.C. Section 2201, declaring unconstitutional that portion of the 1969 Commercial Fishing

Regulations for the State of Alaska designated Section 102.09 and entitled "Salmon Net Gear Licenses," and further declaring unconstitutional Sections 16.05.536, 16.05.540 and 16.05.250 of Alaska Statutes, as amended by Chapter 186, Laws of Alaska, 1968, in that said regulations are in contravention of the Constitution and Fourteenth Amendment to the Constitution of the United States of America and in contravention of the Constitution of the State of Alaska. This action is further for injunctive relief against the enforcement and application of the aforesaid regulations and statutes on the ground of their unconstitutionality and a hearing by a District Court of three judges pursuant to the requirements of 28 U.S.C. §2281 is hereby requested. The matter in controversy exceeds the sum of $10,000 and jurisdiction is based on 28 U.S.C. §§1331 and 1332.

2. Each of the plaintiffs has been engaged at various times in the past as a commercial fisherman for salmon in the waters of the State or the Territory of Alaska. None of the plaintiffs is a resident of the State of Alaska. On or prior to April 15, 1968, John Bozanich and William White applied for a 1968 license authorizing their operation of their own salmon net gear for the Bristol Bay fishing area; Andy Ness and Rudolph Plancich during the same period applied for such a license for operation in the Southeastern fishing area of Alaska, and Alan Takalo during the same period applied for such a license for the Cook Inlet fishing area of the State of Alaska.

3. The defendant, Augie Reetz, is now and was at all times material, the Commissioner of the Fish and

Game Department of the State of Alaska, is responsible for the enforcement of the laws and regulations applicable thereto and, unless restrained from so doing, will enforce the provisions thereof including those more fully described in paragraph 1 of this amended complaint. The remaining defendants are members of the Alaska Board of Fish and Game, and unless the illegality thereof is declared in this suit, will continue to adopt and direct the enforcement of regulations granting special, exclusive and monoply fishing rights. All of the defendants are residents of the State of Alaska.

4. That in February, 1968, the Alaska Board of Fish and Game purported to adopt an amendment to the regulations for commercial fishing in Alaska, designated Part 102.09 and entitled, "Salmon Net Gear License Eligibility," a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A". The aforesaid regulations restricted the issuance of salmon net gear licenses in each registration area to certain persons only who fall within the qualifying conditions set forth in the regulations. Each of the plaintiffs was denied a gear license in the area of his choice for failure to qualify under these requirements. The plaintiffs' names were thereafter deposited with other gear license applicants, whose applications had been denied, for participation in the conduct of a public drawing for the selection of a certain number of additional licensees for each registration area under the provisions of subsection (3) of §102.09 of the regulations of 1968. Such a drawing was held at Juneau, Alaska, on May 9, 1968, at which

drawing approximately 146 applicants were selected for the granting of net gear licenses in the areas of their choice from a total of approximately 315 applicants. The applications of the approximately 169 persons whose names were not selected at the drawing were again denied, including the application of each of the plaintiffs.

5. That in December, 1968, the Alaska Board of Fish and Game purported to adopt a further amendment to the regulations for commercial fishing in Alaska, designated Part 102.09 and entitled, "Salmon Net Gear Licenses," a copy of which is attached hereto and incorporated herein by this reference as Exhibit "B". The aforesaid regulations restrict the issuance of salmon net gear licenses in each registration area to certain persons only, who fall within the qualifying conditions set forth in the regulations. Each of the plaintiffs intend to file applications for gear licenses for the year 1969, similar to the applications filed by them in 1968. Since the 1969 regulations are more restrictive than those of 1968 the plaintiffs cannot qualify for such licenses. Moreover, the public drawing provisions of the 1968 regulations have been eliminated so that the plaintiffs have been deprived of any opportunity of obtaining such licenses for the year 1969.

6. In April, 1968, the legislature of the State of Alaska enacted Chapter 186, Laws of Alaska, 1968, as an amendment to Alaska Statute Section 16.05.536, entitled "Persons Eligible for Gear Licenses," Section 16.05.540, entitled "Limitation on Issuance of Fishing

Gear Licenses" and Section 16.05.250 adding to the authority of the Alaska Board of Fish and Game to establish additional qualifications relating to the eligibility requirements for gear licenses. A copy of this statute is attached hereto and incorporated herein by this reference, as Exhibit "C".

7. The adoption and enforcement of Section 102.09 of the 1969 Alaska Commercial Fishing Regulations which grant some fishermen the right to fish with their own gear in a requested area and deny the same right to other applicants on the sole basis of whether the applicant fished that particular area within specified prior years is violative of and in contravention of the following provision of the Alaska Constitution, to wit:

> "Article VIII, Section 15:
>
> "*No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The subject regulations are also violative and in contravention of the following other provisions of the Alaska Constitution, to wit:

> "Article I, Section 1:
>
> "*Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have cor-

responding obligations to the people and to the State."

"Article I, Section 7:

"*Due Process.* No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

"Article VIII, Section 3:

"*Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

"Article VIII, Section 17:

"*Uniform Application.* Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

As such, the aforesaid regulations constitute a deprivation of the equal protection of the laws, abridge the privileges and immunities of citizens of the United States, and deprive persons of their property without due process of law, as prohibited by Section 1 of Article XIV of the Amendments to the Constitution of the United States of America, by granting fishing rights to some and denying such rights to others who under these laws are equally entitled thereto. That such regulations constitute a violation of the Fourteenth Amendment and constitute a prohibited impairment of inter-state commerce in violation of Article I, Section 8, Clause 3 of the United

States Constitution even without regard to the provision of the Alaska Constitution because there is no reasonable basis for the classification made regarding entitlement and there is no reasonable basis for the discrimination on the fortuitous events described under subsection (2) entitled "Exception for Extreme Hardship" of Section 102.09. In addition, under subsection (B) of subsection (2), entitled "Other Cases of Extreme Hardship", there is an unlawful delegation of legislative authority to a "Hardship Panel" to determine under what "other cases of extreme hardship" a gear license will be granted, without a sufficient standard prescribed.

8. The adoption of the regulations was beyond the power and authority of the Alaska Board of Fish and Game, the extent of which authority is set forth under Alaska Statute Section 16.05.250. No portion of either this or any other Alaska statute either directly or by inference authorizes the restriction on fishing entitlement as promulgated under Section 102.90. The regulations were further adopted in violation of the requirements of Section 44.62 of Alaska Statutes governing the procedure which must be followed in the adoption of regulations by State administrative agencies.

9. The provisions of Chapter 186 of the Laws of Alaska, 1968, amending Section 16.05 of Alaska Statutes as hereinbefore alleged and specifically providing under Section 5 thereof:

> "This Act becomes effective on January 1, 1969, unless all or any part of Sec. 102.09 of the 1968

> Alaska Commercial Fishing Regulations are struck down by the courts, at which time this Act will become effective immediately."

are also and equally in contravention of the aforequoted provisions of the Alaska Constitution, to wit, Article I, Sections 1 and 7, and Article VIII, Sections 3, 15, and 17 and of Article I, Section 8, Clause 3 and the Fourteenth Amendment, Section 1 of the United States Constitution in that a right to fishing gear licenses would be denied some applicants equally entitled thereto under the existing law, and an absolute monopoly of gear licenses is granted to those previously licensed in the same area, or who have fished commercially in that area for someone else for three years. A special and exclusive right of fishery is thereby granted on the sole basis of prior entitlement or employment by someone else who has prior entitlement. The statute further unlawfully grants the Board of Fish and Game authority to make exceptions in cases of "extreme hardship as defined by the Board of Fish and Game" under Section 2 of the Act and authority to "establish additional qualifications" under Section 4 of the Act without prescribing a sufficient or adequate legislative standard for making the administrative determinations provided.

10. That since the enactment of the White Act in 1924, 43 Stat. 464, Ch. 272, until the present season, all persons applying for a gear license were granted one each year in the area of their choice, unless disqualified by reason of their own misconduct. Such

selections could be made in the past to co-ordinate the fishing effort to the anticipated runs without jeopardy of loss of future fishing privileges. All persons enjoyed an equal right of fishery as a common calling in all areas where fishing was permitted. The right to operate or utilize one's own gear in the area of his choice is a valuable right representing potential earnings ranging in varying seasons from share of $500 to $20,000 each. In the Southeastern Alaska fishing area, the owner and licensee of a salmon purse seine, the use of which would require a gear license as herein described, would receive 3 shares, estimated for large runs to be valued at approximately $7,000 per share, or a total value of $21,000 lost to an unsuccessful gear applicant. Continuation of the regulations and statutes, the constitutionality of which is sought to be adjudicated in this proceeding, would result in a recurrence of these losses in future years. The total amount of such losses cannot be estimated, but would far exceed $10,000 for each of the plaintiffs. The loss and damage from the application of these statutes in the denial of a license for the operation of salmon fishing gear results in the irreparable loss and damage above described, for which loss and damage there is no plain, adequate or speedy remedy at law. Utilization of such gear without the required license would result in criminal prosecution and possible confiscation of fishing vessels and equipment, unless such proceedings were restrained in this cause, and would in any event result in a multiplicity of suits.

Wherefore, the plaintiffs pray as follows:

(1) That a three-judge District Court be convened to hear and determine this cause pursuant to the authority and requirements of 22 U.S.C. §§2281 and 2284.

(2) That a temporary restraining order be entered herein restraining the prosecution of these plaintiffs or any other member of the class represented by said plaintiffs, because of the utilization of salmon fishing gear without a license where the sole reason for denying the license is the application of Chapter 186 of the Laws of Alaska, 1968 and/or Section 102.09 of the 1969 Alaska Commercial Fishing Regulations; or in the alternative, requiring the issuance of such licenses to the plaintiff applicants subject to revocation by further order of this court.

(3) That judgment be entered declaring that Part 102.09 of the 1969 Alaska Commercial Salmon Fishing Regulations and Chapter 186 of the Laws of Alaska, 1968, are unconstitutional, null, void and invalid.

(4) That judgment be entered permanently enjoining and restraining the defendants, their successors in office and all persons acting as their agents, officers and servants or under their direction or authority from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the 1969 Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Laws of Alaska, 1968, and from denying fishing gear licenses by reason of the authority thereof.

(5) For such other relief as to the court may seem proper.

Dated this 6th day of January, 1969.

Allen, DeGarmo & Leedy
and Seth W. Morrison
Faulkner, Banfield, Boochever & Doogan
By /s/ R. Boochever
R. Boochever
of Attorneys for Plaintiffs.

Copy received
January , 1969
(signature illegible)
of Attorneys for Defendants.

Exhibit "A"

GENERAL PROVISIONS

(1) It shall be unlawful to use or operate a drum or reel around which a seine is coiled or rolled.

(2) It shall be unlawful to have mounted aboard any seining vessel such seine drum or reel.

(3) This section does not prevent the use of power blocks or the use of a real mounted on a seine skiff to haul in or let out the separate purse seine lead which is temporarily connected to the purse seine proper as these terms are generally employed or used in the fishing industry.

(g) Maximum length of salmon seine vessels.

No salmon seine vessel shall be longer than 50 feet, official register length, and 58 feet overall length except vessels that have fished salmon with seines in waters of Alaska prior to January 1, 1962, as 50 foot, official register length vessels.

(h) It shall be unlawful to use single or multiple strand monofilament purse seine web.

For the purpose of this regulation, "monofilament" means any single filament having more than 50 denier, that is, weighing more than 50 grams per nine thousand meters of filament.

(i) Time limit for preservation of salmon.

It shall be unlawful to preserve for sale as food any salmon unless it shall have been canned, salted, iced,

frozen, brine chilled, smoked, or dried within 48 hours after being killed.

(j) Driving salmon downstream is prohibited.

The driving of salmon downstream or the causing of salmon to go outside the protected area at the mouth of any stream is prohibited.

SALMON FISHERY

102.09 Salmon Net Gear Licenses.[2]

The following regulations regarding Alaska salmon net gear licenses apply to all Salmon Registration Areas listed in Sec. 102.1 (b) (4).

(a) Salmon net gear license eligibility.

An individual applying for a 1968 salmon net gear license for a given Salmon Registration Area shall be issued a salmon net gear license for that area only under the following conditions:

(1) Prior licensing: When the applicant licensed salmon net gear in that Salmon Registration Area in 1965, 1966 or 1967. In the event the applicant licensed salmon net gear in different Alaska Salmon Registration Areas in 1965, 1966 or 1967, he may select any Salmon Registration Area for which he held an Alaska salmon net gear license for those years.

(2) Hardship:

(A) Military Service: If a person held an Alaska salmon net gear license before January 1, 1965 and due to service in the Armed Forces of the United States was precluded from purchasing an Alaska salmon net gear license for

1965, 1966 and 1967, he shall be issued a 1968 salmon net gear license upon application.

(B) Investment in vessels: A person who made a commitment between April 16, 1966 and December 16, 1967 for the purchase or construction of a salmon net vessel to be used in an Alaska salmon net fishery will be issued a 1968 salmon net gear license, if either of the following conditions are met:

(I) The salmon net vessel purchased was larger than 16 feet and evidence of purchase, such as a copy of bill of sale, copy of a cancelled check, or affidavits by both the buyer and seller, is furnished to the Commissioner.

(II) In the case of vessels being built, or modified, the keel has been laid and/or an investment has been made for material in excess of $200, and evidence of construction, such as a copy of a contract with a boatyard, or copies of cancelled checks or a bill of sale for material, is furnished to the Commissioner.

(C) Investment in Gear: A person who made an investment between April 16, 1967 and December 16, 1967 of at least $200 in salmon net gear to be used by the purchaser in an Alaska salmon net fishery will be issued a 1968 salmon net gear license upon submission to the Commissioner of evidence of purchase, such as a copy of a bill of sale, copy of a cancelled check, or affidavits by both buyer and seller.

(D) Sickness and/or Death: A 1968 salmon net gear license shall be issued to a person who held an Alaska salmon net gear license before 1965 and who can present evidence in

the form of a doctor's statement or affidavits from knowledgeable persons, of illness which incapacitated him for 1965, 1966 and 1967. If a head of a household, who held a 1965, 1966, or 1967 Alaska salmon net gear license, is prevented from fishing in 1968 because of medical reasons or death, a member of his family shall be issue a 1968 salmon net gear license. The family member to be licensed shall be selected by the family in question.

(E) New and developing fisheries: The Commissioner shall authorize the issuance of 1968 salmon net gear licenses for new and developing salmon net fisheries only under the following conditions:

(I) The new and developing salmon net fisheries are west of Umnak Island in Salmon Registration Area M, or in Salmon Registration Areas W, X, Y and Z, and

(II) The issuance of such licenses is necessary to enable the harvest of salmon from new and developing fisheries.

(F) Change of Domicile within Alaska: An individual who is eligible for a 1968 salmon net gear license for a given Salmon Registration Area under Sec. 102.09 (a) (1) will be granted a salmon net gear registration for a different Salmon Registration Area if he changed his domicile to that area after April 15, 1967, and he waives his right to be registered for the other Salmon Registration Area.

Exhibit "B"

EXTRACT FROM 1969 COMMERCIAL FISHING REGULATIONS FOR THE STATE OF ALASKA

Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear licenses for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;

If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certi-

fied by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a location where eligible fishermen are insufficient to adequately harvest the resource.

Exhibit "C"

LAWS OF ALASKA

(Seal)

1968

Source	Chapter No.
FCCSSB 327	186

AN ACT

Relating to persons eligible to obtain gear licenses; and providing for an effective date.

Be Is Enacted by the Legislature of the State of Alaska:

* Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature

to impose experience requirements before issuance of salmon gear licenses to applicants.

* Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. PERSONS ELIGIBLE FOR GEAR LICENSES. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the ap-

plicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

* Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. LIMITATION ON ISSUANCE OF FISHING GEAR LICENSES. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

* Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

* Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968

Actual effective date: January 1, 1969

[Title of Court and Cause]

ANSWER TO AMENDED COMPLAINT

Come Now the defendants in the above entitled suit, by and through their duly authorized counsel, G. Kent Edwards, Attorney General for the State of Alaska, and in answer to plaintiffs' amended complaint admit, deny and allege as follows:

I

The defendants admit that the plaintiffs are seeking injunctive relief and a declaratory judgment. The defendants deny each and every other allegation contained in paragraph 1 of the amended complaint.

II

The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the amended complaint and do, therefore, deny each and every allegation contained in paragraph 2 of the amended complaint.

III

The defendants admit that Mr. Augie Reetz is the Commissioner of the Fish and Game Department of the State of Alaska and is responsible for the enforcement of the laws and regulations applicable thereto. The remaining defendants also admit that they are members of the Alaska Board of Fish and Game. The defendants admit that they are residents of the State of Alaska. The defendants deny each and every other allegation of paragraph 3 of the amended complaint.

IV

The defendants admit the allegations contained in paragraph 4 of the amended complaint except for that

portion of paragraph 4 wherein plaintiffs state that the Alaska Board of Fish and Game "purported" to adopt an amendment to the regulations. Defendants state specifically that the Alaska Board of Fish and Game did, in fact, adopt an amendment to the regulations.

V

In respect to the allegations contained in paragraph 5 of the amended complaint defendants state that in December 1968 the Alaska Board of Fish and Game considered the adoption of amendments to the regulations for commercial fishing in Alaska. Such amendments have not been adopted, nor can they be prior to the meeting of February 8 of the Alaska Board of Fish and Game and cannot be effective until thirty days thereafter. As to the remainder of paragraph 5 defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5, and do, therefore, deny each and every remaining allegation contained therein.

VI

The defendants admit the allegations contained in paragraph 6 of the amended complaint.

VII

The defendants deny each and every allegation of paragraph 7 of the amended complaint.

VIII

The defendants deny each and every allegation of paragraph 8. Further, defendants allege that insofar

as paragraph 8 applies to the proposed 1969 commercial salmon fishing regulations, such regulations have not yet been adopted by the defendants, nor can they be prior to February 9, 1969.

IX

The defendants deny each and every allegation of paragraph 9 of the amended complaint.

X

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the amended complaint, except that the defendants admit that fishing without the required licenses could result in criminal prosecution and possible confiscation of fishing vessel and equipment, and do, therefore, deny each and every allegation of paragraph 10 of the amended complaint except as aforementioned.

Wherefore, the defendants pray that the amended complaint in this matter be dismissed and the relief asked for be denied; that defendants be awarded reasonable costs and attorney fees incurred in defending the action herein; and for such other relief as the Court may deem just and proper.

Dated at Juneau, Alaska, this 15th day of January, 1969.

G. Kent Edwards
Attorney General

By: /s/ Robert J. Mahoney
Robert J. Mahoney
Assistant Attorney General

[Title of Court and Cause]

AFFIDAVIT OF RUDOLPH PLANCICH

State of Washington
County of King—ss.

Rudolph Plancich, being first duly sworn, on oath, deposes and says:

That he is now and has been since 1920 a commercial fisherman. That he is an American citizen. That he has fished as a commercial fisherman for salmon in Alaska waters since 1936, although some years in between he fished in Puget Sound waters when poor Alaska runs were predicted.

That in 1960, he built the gill net vessel "ST. TERESA" and fished in Bristol Bay as a gill net fisherman on this vessel from 1960 through 1966. Because of a back injury, he did not fish in Bristol Bay in 1967.

In 1964, he built the purse seine vessel "ST. MARY II" which fished in Southeastern Alaska in 1964 and 1965 with a crew supplied by the Nakat Packing Corporation, and in 1966 the vessel was licensed in Kodiak in connection with a sale of the vessel which was not consummated. In 1967, because a poor run in Southeastern Alaska was predicted, the vessel "ST. MARY II" fished in Puget Sound.

In 1968, it is anticipated that there will be a very small run of salmon in Bristol Bay, but it is also predicted that there will be a very large run of salmon in the Southeastern District of Alaska, estimated to involve as many as 22 million fish. There is concern that there may not be a sufficient fishing

effort in Southeastern Alaska to effectively harvest a sufficient portion of the run to avoid excessive and wasteful escapement.

In view of the predictions, Affiant applied to the Alaska Department of Fish and Game for a gear license to fish in the Southeastern District instead of Bristol Bay for the 1968 season. Notwithstanding the economic and conservation factors which show that the fishing effort should be concentrated in Southeastern Alaska and minimized in Bristol Bay, the Alaska Fish and Game Department refused Affiant's application in a letter dated April 8, 1968 and attached to this affidavit as Exhibit 1, which refusal was based on the requirements and provisions of Section 102.09 of the Alaska Commercial Fishing Regulations adopted for 1968. Affiant's name was placed in the drawing scheduled to be conducted pursuant to the provisions of Section 102.09(3)(D) of the regulations. This drawing was actually held on May 9, 1968 at the offices of the Department of Fish and Game for the State of Alaska, but Affiant's name was not drawn. He was therefore denied a license for Southeastern Alaska, as appears from the letter of May 13, 1968 from Mr. Augie Reetz, a Commissioner of the Alaska Department of Fish and Game, which letter is attached to this affidavit and marked Exhibit 2. Unless Affiant receives judicial relief, he will be prohibited from participating in the Southeastern District salmon fishery for 1968.

Affiant estimates that if he fishes in Bristol Bay in 1968, his earnings will be approximately $200 to $500 after expenses for the entire season. On the

other hand, if he were able to fish in Southeastern Alaska, his earnings for one share as a crew member, based on past actual earnings in good years, would be approximately $6,000 to $7,000, and could well be even more. In addition, the delay arising from the processing of his application and the final refusal which was not confirmed until May 13 has made it very unlikely that he will be able to obtain a competent and qualified captain for the vessel and assemble a competent crew. The vessel receives two shares of the total catch under the customary arrangement, and if Affiant is unable to fish it or have it fished, he will lose an additional $14,000. The vessel represents an investment of approximately $45,000 and particularly in this year of restricted licensing and the great demand for competent vessel captains and crewmen, the likelihood of obtaining a competent crew is very remote. The risk of navigation and fishing is such and the investment is so great that much care must be exercised in selecting an appropriate crew.

The loss and damage which Affiant will suffer in 1968 if not permitted to fish in Southeastern Alaska will beyond doubt occur in future years if the same or similar regulations are again promulgated or if comparable statutory provisions continue in effect, but the amount of such loss cannot be estimated. Affiant has no means of recovering this loss for the year 1968 or the loss in future years and no adequate remedy at law.

In 1967, but prior to April 16, Affiant invested slightly over $1,000 in purchasing salmon net gear to

be used in Southeastern Alaska. Although this showing was made to the Department of Fish and Game, the application was nevertheless denied presumably under the time limitations set forth in 102.09(1)(C). Affiant is aware of other applicants who made the minimum $200 investment after April 16, 1967 and who were granted licenses to fish in Southeastern Alaska for 1968, notwithstanding the fact that these applicants had never before been to the State of Alaska for fishing.

/s/ Rudolph Plancich
Rudolph Plancich

Subscribed and sworn to before me this 25th day of May, 1968.

/s/ Seth W. Morrison
Notary Public in and for the State of Washington, residing at Seattle.

[Title of Court and Cause]

MOTION TO DISMISS ACTION

(Or in the Alternative to Stay Proceedings)

The Defendants move the court as follows:

To dismiss the action, or in lieu thereof to say proceedings herein, on the following grounds:

(a) That Plaintiffs may have an adequate, speedy and complete determination of the controversy in the Superior Court of the State of Alaska;

(b) That the within case involves the construction of a state constitution and state statute and regulations;

(c) That determination of the state issues by a State Court may remove all Federal issues.

Dated this 16th day of September, 1968, at Juneau, Alaska.

G. Kent Edwards
Attorney General

By /s/ Robert J. Mahoney
Robert J. Mahoney
Assistant Attorney General
Attorney for Defendants

[Title of Court and Cause]

MOTION FOR SUMMARY JUDGMENT, AND SUGGESTION OF MOOTNESS

Pursuant to Rules of Civil Procedure 56, defendant Augie Reetz, Commissioner of Fish and Game for the State of Alaska, and all other defendants herein move the Court to enter summary judgment in favor of defendants on the following grounds:

1. Section 102.09 of the Commercial Fishing Regulations of the State of Alaska, are no longer of any force and effect, both as to these plaintiffs, and as to any person applying for commercial salmon net gear licenses in the State of Alaska or elsewhere.

2. The plaintiffs herein have never applied for, and consequently have never been denied salmon net gear licenses under the provisions of Chapter 186, SLA 1968. Hence there is no actual controversy between the parties as to that chapter.

3. There is no genuine issue as to any material fact herein and that defendants are entitled to judgment as a matter of law.

This motion is based upon:

1. Defendants' memorandum.

2. The files and records of this case.

3. Supporting affidavit of Augie Reetz, Commissioner of Fish and Game of the State of Alaska.

Dated at Juneau, Alaska, this 6th day of November, 1968.

G. Kent Edwards
Attorney General

By: /s/ Robert J. Mahoney
Robert J. Mahoney
Assistant Attorney General

[Title of Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

State of Alaska—ss.

First Judicial District

Augie Reetz, being first sworn, deposes and says:

(1) That he is the duly appointed Commissioner of the Department of Fish and Game, State of Alaska.

(2) The 1968 commercial fishing regulations are no longer in effect as to their application to salmon net gear licensing due to the fact that there is no salmon net gear fishery operating within the state during this period. Salmon are not now available to salmon net gear and the season has been closed for the calendar year 1968.

(3) The 1968 regulations concerning eligibility for salmon net gear licensing do not apply to any other year. No application for salmon net gear licenses can now be considered due to the April 15, 1968 deadline on such licenses. Regulations concerning eligibility for salmon net gear licensing in 1969 will be adopted by the Board of Fish and Game at their fall meeting in 1968.

(4) No applications are being accepted for salmon net gear licenses for 1969 since the regulations governing such issuance have not been promulgated. No applicants have been denied a salmon net gear license as of this date nor have any licenses been issued.

Applications for 1969 salmon net gear licenses will be accepted after the 1969 regulations are in effect. The regulations usually become effective in early February.

/s/ Augie Reetz
Augie Reetz
Commissioner of Fish and Game

Subscribed and sworn to before me this 5th day of November, 1968.

/s/ Florence K. Floreske
Notary Public, State of Alaska.
My commission expires May 15, 1971.

[Title of Court and Cause]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come Now the above named Plaintiffs through their attorneys of record and move the Court for entry of a summary judgment pursuant to Civil Rule No. 56 declaring Chapter 186 of the 1968 Session Laws of the State of Alaska and Regulation Section 102.09 of the 1968 Commercial Fishing Regulations for the State of Alaska unconstitutional and void.

1. There is attached to and made a part of this motion (designated Exhibit A) a true copy of Section 102.09 entitled "Salmon Net Gear Licenses" of the Commercial Fishing Regulations of the State of Alaska for 1968, and (designated Exhibit B) Chapter 186 of the 1968 Session Laws amending Sections 16.05.536, 16.05.540 and 16.05.250 of Alaska Statutes.

2. The Defendants have admitted in paragraphs III, IV and V the following allegations of the Complaint, to-wit:

Paragraph III of the Answer:

> "The defendants admit that Mr. Augie Reetz is the Commissioner of the Fish and Game Department of the State of Alaska and is responsible for the enforcement of the laws and regulations applicable thereto. The remaining defendants also admit that they are members of the Alaska Board of Fish and Game. The defendants admit that they are residents of the State of Alaska. . . ."

Paragraph 4 of the Complaint:

> "That in February, 1968, the Alaska Board of Fish and Game purported to adopt an amend-

ment to the regulations for commercial fishing in Alaska, designated Part 102.09 and entitled, 'Salmon Net Gear License Eligibility,' a copy of which is attached hereto and incorporated herein by this reference as Exhibit A. The aforesaid regulations restrict the issuance of salmon net gear licenses in each registration area to only certain persons who fall within the qualifying conditions set forth in the regulations. Each of the plaintiffs was denied a gear license in the area of his choice for failure to qualify under these requirements. The plaintiffs' names were thereafter deposited with other gear license applicants, whose applications had been denied, for participation in the conduct of a public drawing for the selection of a certain number of additional licenses for each registration area under the provisions of subsection (3) of Section 102.9 of the regulations. Such a drawing was held at Juneau, Alaska, on May 9, 1968, at which drawing approximately 146 applicants were selected for the granting of net gear licenses in the areas of their choice from a total of approximately 315 applicants. The applications of the approximately 169 persons whose names were not selected at the drawing were again denied, including the application of each of the plaintiffs."

except that defendants denied that the Alaska Board of Fish and Game "purported" to adopt Section 102.09 as alleged, and asserted that defendants did, in fact, adopt said Section.

Paragraph 5 of the Complaint:

"In April, 1968, the legislature of the State of Alaska enacted Chapter 186 Laws of Alaska 1968 as an Amendment to Alaska Statute Section 16.-

05.536 entitled 'Persons Eligible for Gear Licenses,' Section 16.05.540, entitled 'Limitation on Issuance of Fishing Gear Licenses' and Section 16.05.250 adding to the authority of the Alaska Board of Fish and Game to establish additional qualifications relating to the eligibility requirements for gear licenses. . . ."

3. The aforesaid regulations and statute are invalid as being in contravention of Article I, Section 8, Clause 3 of the United States Constitution and the Fourteenth Amendment, Section 1, to said United States Constitution, to-wit:

Article I

"§8. Powers of Congress. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

* * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

Amendment XIV

"§1. Citizenship rights not to be *abridged by states.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Said conflict appears from the clear language of the regulations and statute without the necessity of resorting to further facts and circumstances requiring a trial.

4. The aforesaid Statute and regulations, and each of them, are also invalid as being in conflict with certain provisions of the Constitution of the State of Alaska. Said conflict appears from the language of the regulations and the statute, without the necessity of resorting to further facts and circumstances requiring a trial. The principal provision of the Alaska constitution invalidating the above designated statute and regulations is Article VIII, Section 15, which provides:

"Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The regulations and statute are also invalid as in conflict with the following additional provisions of the Alaska constitution:

Article I

Section 1. *Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons

have corresponding obligations to the people and to the State."

"Section 7. *Due Process.* No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

Article VIII

"Section 3. Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

"Section 17. Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

5. (a) The provisions of Article VIII, Section 15 of the Alaska constitution were taken nearly verbatim from Section 1 of the White Act, as amended, (48 U.S.C. §221, 222) which has been held in *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 93 L ed 1231, to prohibit the limitation of fishing rights to any special group or number of people. A group composed of those who have been previously licensed as described in Chapter 198 and Regulation Section 102.09 constitutes such a "special group."

(b) The provisions of Article I, Section 1 and 7 of the Alaska constitution have been held to prohibit discrimination in fishing rights based on residency in the case of *Brown v. Anderson* (Alas. 1962) 202 F. Supp. 96 (three judge court). The same provisions

are equally applicable under said authority to prohibit discrimination based on prior licensing in a specified fishing area.

(c) A provision in the constitution of the State of Washington substantially equivalent to Article I, Section 1; Article VIII, Section 3; Article VIII, Section 15 and Article VIII, Section 17 of the Alaska Constitution and the Fourteenth Amendment to the United States Constitution was held to prohibit legislation which would have limited entitlement to fishing licenses to those persons who had been issued licenses for the prior two years in the case of *State Ex Rel. Bacich v. Huse,* 186 Wash. 75, 59 P.2d 1101.

(d) The foregoing case authorities and constitutional provisions submitted in support of this motion will be supplemented together with a response to the Defendants' Motion for Summary Judgment and Suggestion of Mootness to be submitted on or before December 15, 1968 in accordance with paragraph 3 of the Court's order in this cause of October 21, 1968.

Dated at Juneau, Alaska, this 21st day of November, 1968.

Allen, DeGarmo & Leedy,
Seth W. Morrison
Faulkner, Banfield, Boochever & Doogan

By /s/ Avrum M. Gross
Avrum M. Gross

Copy received

November ....., 1968.

.....

of Attorneys for Defendants

State of Alaska
Walter J. Hickel, Governor
Department of Law
Office of the Attorney General
Pouch K, State Capitol—Juneau 99801

February 9, 1968

Honorable Urban C. Nelson, Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: 1968 Commercial Fishing Regulation
Section 102.09 and 104.09

Dear Commissioner Nelson:

We have most carefully and conscientiously examined and reexamined Sections 102.09 and 104.09 of the proposed 1968 Commercial Fishing Regulations in a sincere effort to find a sound legal basis on which to support their validity. We made this special effort because we were mindful of the many days and hours expended by the Board of Fish and Game and by your Department in hearings, deliberations, consultations, and research as well as preparation and drafting for the purpose of arriving at a set of salmon fishery gear limitations which would be sufficient to cope with the tremendous problems involved in protecting the species and avoiding the disastrous economic cycles, particularly in the Bristol Bay area, which recurringly threaten the industry.

We are most hesitant to invalidate the product of so much hard, conscientious and sincere labor of so many devoted public servants. Nevertheless, we are charged by law with the duty of examining these reg-

ulations for their legal validity and moreover will be called upon to defend them against attack in the courts which may be confidently expected to materialize in the fact of such significant xercise of the state police power.

We have reluctantly come to the conclusion that we cannot sustain the validity of these regulations as presently proposed for the following reasons:

1. With respect to Section 104.09, governing Salmon Registration Area T, we do not believe that the point-credit system for 1968 or its continuation for years subsequent to 1968, as set forth in subsections (a) and (b) of the cited section, can be sustained because, instead of being based upon a broad historical period and all available statistical records, it arbitrarily selects the 1967 season as the only qualifying test. Moreover, we feel that elimination of all other pertinent tests of qualification and concentration of prior registration during the 1967 Bristol Bay fishing season is so narrow as to invite a finding that it is arbitrary because it is lacking in reasonable classification and because there is no rational connection between the biological, social and economic factors underlying the Bristol Bay fisheries emergency and the remedy adopted by the regulation.

In fact, Section 102.09 suffers from the same type of deficiency since only those who obtained year licenses in 1966 or 1968 are allowed to fish in the remaining salmon registration areas of the state.

A statute containing provisions similar to Section 102.09 of the proposed regulations was challenged in the case of *State ex rel. Bacich v. Huse,* 59 P.2d 1101

(Wash., 1936). The statute permitted only those persons who had held salmon gill net licenses in 1931 or 1932 to purchase salmon gill net licenses in 1933. No provisions for new entrants was embodied in the statute.

The Washington Supreme Court held that the statute violated the Fourteenth Amendment of the United States Constitution for two reasons. 1) it set up a special privilege in a few people without justifiable reason for the selection of the privileged few (discussed more fully below), and 2) the choice of the base years was "not predicated on any fair, just or natural basis of selection, but [was] wholly arbitrary and capricious." The court stated:

> The classification made by section 4 of the [Washington] act in question can have no natural, reasonable or just relation to the subject matter of the act. If conservation be the end sought, it is not promoted by selecting a particular class of persons on an arbitrary basis and conferring special privileges on them and denying the same privileges to others. Concededly, regulations might be prescribed which would tend to accomplish the desired result. But such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state. The selection rests upon mere accident or circumstance, and not upon conditions effecting a natural line of cleavage. We are of

> the opinion, and hold, that section 4 of the act . . . is unconstitutional and void. (*Supra* at 1105)

In another case, *Rabin v. Connor,* 174 So.2d 721 (Fla., 1965), a serious economic problem in the celery industry of Florida had prompted the legislature to conduct an extensive study of the industry. As a result of the legislative findings an act was passed and regulations were promulgated which made the amount a celery producer could sell depend upon the amount he had sold in two past celery seasons. Provision was even made for issuance of a very small number of temporary certificates to producers who had not grown celery in the two designated seasons.

The Supreme Court of Florida held that the statute and regulations violated the Fourteenth Amendment to the U.S. Constitution. The Court said:

> In determining the validity of legislation and orders of the kind involved here, the vital factor to be considered is the practical effect and impact thereof . . . The practical effect of this marketing order is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny others the right to participate at all.
>
> . . . It is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and denial of equal protection of the law. . . . (*Supra* at 725)

2. We believe that Sections 102.09 and 104.09 are also invalid because they do not provide for the licensing of new entrants, who must be admitted under any rational system of gear limitation in order to meet the constitutional requirements. The United States Constitutional requirements in this regard were discussed above in connection with the *Huse* and *Rabin* cases and will not be further expounded upon here. However, there are two Alaska constitutional provisions (in addition to the provisions which parallel the U.S. Constitution) which are also violated by these regulations.

Article 1, Section 15 of the Alaska Constitution provides in pertinent part:

> . . . No law making any irrevocable grant of special privileges or immunities shall be passed . . .

Similar provisions in other state constitutions have been held to mean that a state may not grant an exclusive right to fish to a person or a specific group of persons. 36A C.J.S. Fish Section 36, page 562. *State ex rel. Game Commission v. Red River Val. Co.*, 182 P.2d 421 (N.M., 1946).

However, perhaps the most pertinent provision of the Alaska Constitution is Article VIII, Section 15 which provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

This provision was derived from Sec. 1 of the White Act of June 6, 1924, 43 Stat. 464, 48 U.S.C.A. Sec. 221 under which Alaska Fisheries were managed prior to statehood.

The constitutional framers were specific in noting that the phrase was adopted in the Constitution to implement the same goal as that achieved by the Federal statute. The Natural Resources Committee of the Constitutional Convention submitted the following commentary on Section 15 to the Convention:

> Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. (Emphasis added.) "Commentary on Article on State Lands and Natural Resources," January 16, 1956, p. 9.

In interpreting the scope of the exclusive right of fisheries clause, therefore, it is relevant to examine the interpretation of the clause which existed at the time of the adoption of the State Constitution.

In *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949), the U.S. Supreme Court in interpreting the White Act stated:

> "Exclusive," as used in Section 1 (of the White Act) . . . forbids not only a grant to a single person or corporation but to any special group or number of people. . . . The White Act fishing preserves were not intended to favor a monopoly to a favored few. (*Supra* at 122)

In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those

who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery. Moreover, we do not believe that the hardship clauses in Sections 102.09 and 104.09 save them from the taint of exclusivity since the clauses are far too narrowly limited. This is especially true of the hardship clause of Section 104.09 since its applicability is contingent upon the number of 1967 fishermen who apply for a 1968 license.

3. In addition the general moratorium applicable to salmon fishery in all areas of the state (Section 102.09) cannot be sustained in view of the fact that the specific limitations imposed upon the issuance of salmon gear licenses in the Bristol Bay disaster area have been pegged to the highest number historically issued in that area. Had there been a drastic reduction in the total number of licenses to be authorized from that experienced in the past year or two, it could have been successfully argued that an overall moratorium was necessary to avoid a mass exodus of salmon fishermen from the Bristol Bay area, resulting in an overflow into other fishing areas of the State. In the absence of such economic and historical justification, we believe that Section 102.09 would be struck down as being in excess of the police power of the State and in violation of equal protection and due process clauses of the Federal and State Constitutions.

4. Finally it is our oipnion that the authority delegated the Board under A.S. 16.05.250 does not include the power to establish age limitations of the

type contained in Section 104.09. As stated in A.S. 44.62.020:

> . . . to be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

Let me again reiterate and stress the great reluctance with which we have reached the foregoing conclusions. We feel however, that to ignore our serious legal doubts and to permit these regulations to take effect only to find them immediately attacked in the courts and then perhaps set aside right at the beginning of the fishing season, would do a great disservice to all concerned.

We regret the delay in transmitting these observations and recommendations, which was occasioned by our great desire to explore every possible avenue which would avoid questioning the validity of these carefully considered regulations. We continue to stand ready to work with your department and with the Board in a continued effort to promulgate regulations or to recommend legislation which would solve these great problems within the legal framework of our Federal and State Constitutions and laws.

Sincerely yours,
Edgar Paul Boyko
Attorney General

EPB:mmm

cc Honorable Walter J. Hickel
Governor of Alaska
Chairman of the Board of Fish and Game
Members of the Board of Fish & Game
Secretary of State

PROPOSED REGULATION 109.09

STATEWIDE MORATORIUM

Proposal 15 (Adopted as amended)

1. A person who licensed gear in either 1966 or 1967 will be allowed to license gear for 1968.
2. Persons desiring to license gear in a given gear registration area shall be allowed to license as follows:
   a) Persons who licensed gear in that gear registration area during 1967.
   b) Persons who licensed gear in that gear registration during 1966.
   c) Hardship situations determined by the Commissioner.

   Recognizing that an excessive number of units of gear in some areas during recent years has contributed to serious economic conditions and has created critical problems in resource management because of potential excessive harvest during any open season, it is the purpose of this section to prevent a shift of gear from such emergency to other areas and thereby prevent these same critical conditions from arising elsewhere in the state.
3. Hardship is defined as the inability to license gear in an area during 1967 or some previous year due to circumstances beyond the control of the applicant, military service, sick-

ness, death of the head of household and other hardship conditions.

4. *Appeals:*

Any person denied gear license may appeal this determination by completing application Form FG-196 and filing the same with the Commissioner at Juneau, Alaska not later than May 1, 1968.

A hearing officer shall be appointed by the Commissioner of Fish and Game and a hearing shall be conducted at a convenient location selected by the Department from the area for which gear registration is sought by the appellant. The hearing shall be commenced not later than 20 days after receipt of Form FG-196. All parties directly interested shall be notified by mail at least 10 days prior to the hearing date.

Within 10 days after the hearing, the Commissioner of Fish and Game shall review the recommendations of the hearing officer, and shall render a decision thereon. He shall promptly advise all directly interested parties of his decision by mail.

PROPOSED REGULATION 104.09

POINT SYSTEM

Proposal 35 (Adopted as amended)

1. No more than 2,529 units of gear are authorized to be licensed to the Bristol Bay registration area during 1968.

2. Applicants wishing to license gear for the Bristol Bay registration area will be licensed on the basis of the applicant's point credit rating which will include factors of fishing experience, hardship, and commercial fishing violations.

[6] *3.* Ten (10) points are required to apply for a gear license in 1968.

Point credits will be given as follows:

[3] *4.* Ten (10) points if the applicant held a gear license registered to Bristol Bay during the year 1967.

[4] *5.* Ten (10) points for the year in which a section or district was closed to taking of salmon, the applicant having fished such closed section or district the previous year, provided that the applicant did not license and fish gear in another section or district during the year for which this ten (10) points is claimed.

[5] *6.* Ten (10) points for any applicant that held a gear license for Bristol Bay in 1967 and made application and received a gear license for Bristol Bay in 1968 or subsequent years.

Nothing contained herein should be construed to mean that any licensee must participate in the 1968 fishery in order to earn their points of credit.

7. Points will be deducted for each destructive fishing violation in Bristol Bay (fishing closed waters or during closed periods) on the part of the applicant after 1967 as follows:

   Five (5) points for each violation. These points to be accumulative.

8. The Commissioner may issue gear registrations on the basis of hardship, not to exceed the authorized units of gear allowed in (1) above. Hardship refers to circumstances beyond control of the applicant; military service, sickness, death of the head of household and other hardships. Allocations under this section will be based on the credit point system coupled with allowances for hardship.

9. New applicants will be allowed to license gear in Bristol Bay. Age limit for gear licensing to be 12 or over. Application may be made for any or all of 4 years prior to age limit. Five (5) points credit for each year applicant has held a commercial fisherman's license for Bristol Bay commencing January 1, 1968.

10. On or before March 1, 1968 the Department will make available a list of all persons

found eligible for registration of gear in Bristol Bay during 1968. This list shall include the qualified applicants having the highest point credit rating. Selections from persons having identical point credit will be by lot at a public drawing conducted in the area in the presence of persons affected.

11. *Appeals*

Any person denied gear registration by reason of his ranking in the point credit system may appeal this determination by completing application Form FG-196 and filing the same with the Commissioner at Juneau, Alaska not later than May 1 of that year.

A hearing officer shall be appointed by the Commissioner of Fish and Game and a hearing shall be conducted at a convenient location selected by the Department from the area for which gear registration is sought by the appellant. The hearing shall be commenced not later than 20 days after receipt of Form FG-196. All parties directly interested shall be notified by mail at least 10 days prior to the hearing date.

Within 10 days after the hearing, the Commissioner of Fish and Game shall review the recommendations of the hearing officer, and shall render a decision thereon. He shall promptly advise all directly interested parties of his decision by mail.

12. Persons desiring to make application for registration of gear in Bristol Bay may do so by submitting an application on a form provided by the Department on or before April 15 by mail to:

    Alaska Dept. of Fish & Game
    Subport Building
    Juneau, Alaska

13. Each and every section of this regulation shall be deemed to be severable from every other section and a decision affecting the constitutionality of one section shall not be deemed to affect any other.

February 16, 1968

The Honorable August F. Reetz
Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: Proposed Section 102.09 of the
1968 Commercial Fishing
Regulations

Dear Commissioner Reetz:

Pursuant to AS 44.62.060 our office has reviewed the above referenced regulation and have concluded that it is legally valid, clear in content and proper in form.

By copy of this letter we are also advising the Secretary of State of our belief that the notice of publication requirements of the Administrative Procedure Act have been complied with in promulgating said regulation even though the regulation was a product of two separate Board meetings, only one of which was designated in the public notice regarding said regulation.

Sincerely,

Edgard Paul Boyko
Attorney General
By G. Kent Edwards
Deputy Attorney General

EPB:GKE:rw

cc: Secretary of State

[Title of Court and Cause]

INTERROGATORIES PROPOUNDED TO THE DEFENDANTS

1. Specify the number of people with total lack of experience in the particular area in which they fished who were issued gear licenses and fished in those areas during each of the calendar years 1965, 1966 and 1967.

2. Give the names and addresses of each such person totally lacking in experience in the particular area.

3. State in detail what additional management problems were posed by the lack of experience of the individuals named in answer to Interrogatory No. 2. Give specific incidences pertaining to each such problem and explain why the problem was due to the total lack of experience of the licensee in the particular area.

4. List all violations of fishing regulations by salmon net gear licensees which were made the subject of formal complaints during each of the years 1963, 1964, 1965, 1966 and 1967, designating the name and address of the licensee involved, the particular charge involved, the disposition of the case and specifying whether the licensee was totally lacking in experience in the particular area.

5. Designate each accident of which you have knowledge involving substantial injury to persons or to property as a result of action or inaction on the

part of a gear licensee during each of the years 1963, 1964, 1965, 1966 and 1967, giving the following information:

a. The nature of the incident involved;

b. Description of the injuries to person or property involved;

c. The name of the gear licensee involved;

d. His last known address;

e. The place where the incident occurred;

f. Whether the gear licensee was totally lacking in experience in the particular area involved.

Dated at Juneau, Alaska, this January 2, 1969.

Faulkner, Banfield, Boochever & Doogan
By /s/ R. Boochever
of Attorneys for Plaintiffs

Copy received
January 2, 1969
Charles K. Cranston
of Attorneys for Defendants

[Title of Court and Cause]

DEFENDANTS' ANSWERS TO INTERROGATORIES

Answers of defendants to interrogatories served on them by plaintiff on January 2, 1969.

Interrogatory No. 1. The Alaska Department of Fish and Game has not compiled information from its files in sufficient detail to enable it to specify the number of people with total lack of experience in the particular area in which they fished who were issued gear licenses and fished in those areas during each of the calendar years 1965, 1966 and 1967. The Alaska Department of Fish and Game has on file commercial fishing license applications from 1960 to the present. During these years the average number of commercial fishing license applications number approximately 18,000 and the average number of commercial fishing gear license applications number approximately 10,000. To compile the information requested by plaintiffs' interrogatory would require several months effort by at least two people who would have to be hired to do the job.

Interrogatory No. 2. The Alaska Department of Fish and Game has not compiled information from its files in sufficient detail to enable it to give the names and addresses of persons totally lacking in experience in the particular area in which they fished in each of the calendar years 1965, 1966, and 1967. The reasons for the lack of such information are the same as given in the answer to Interrogatory No. 1.

Interrogatory No. 3. Interrogatory No. 3 requests an answer stating in detail what additional management problems were posed by the lack of experience

of the individuals named in the answer to Interrogatory No. 2. It further requests an answer giving specific incidences pertain to each such problem and explanation as to why the problem was caused by the total lack of experience of the licensee in the particular area. Since the Department of Fish and Game does not have available the names and addresses of of the persons described in Interrogatory No. 2, defendants are unable to supply the information requested. Defendants state further that there is no information readily available describing specific incidents wherein additional management problems were caused by licensees with a total lack of experience who fished a particular area.

Interrogatory No. 4. The Department of Fish and Game has not compiled sufficient information to enable it to answer the interrogatory. Interrogatory No. 4 requests an answer listing all violations of fishing regulations by salmon net gear licensees which were made the subject of formal complaints in each of the years 1963, 1964, 1965, 1966 and 1967. The interrogatory further requests that the name and address of the licensee involved, the charge involved, the disposition of the case and a statement as to whether the particular licensee involved was totally lacking in experience in the area involved. During each of the years noted there have been approximately 1,000 formal complaints filed. In addition there have been thousands of informal warnings issued. The complaints are filed alphabetically in the Department's files and to extract the information requested from those files would require the assigning of additional clerical help to do the work, and would require a period in excess of one week. In addition,

to furnish information as to whether the particular licensee who was the subject of a formal complaint was totally lacking in experience in the area in which he fished would require a compilation of information requested by Interrogatories 1 and 2. This the Department of Fish and Game has not done.

Interrogatory No. 5. The Alaska Department of Fish and Game has no information which would enable it to answer Interrogatory No. 5.

No defendant in the within action has additional knowledge which would enable it to answer any interrogatory in a manner different from the above.

Dated at Juneau, Alaska, this 17 day of January, 1969.

Augie Reetz
Commissioner of Fish and Game

State of Alaska
First Judicial District—ss.

Augie Reetz, being duly sworn, deposes and says that he resides at Juneau, Alaska; that he is one of the defendants herein and the Commissioner of Fish and Game for the State of Alaska; that he has read the foregoing answers to interrogatories and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

/s/ Augie Reetz

Subscribed and sworn to before me this 17th day of January, 1969.

(Seal)

/s/ Janet R. Taguchi,
Notary Public, State of Alaska.
My commission expires 6/7/71.

[Title of Court and Cause]

PLAINTIFFS' NOTICE OF RENEWAL OF MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs do hereby renew their Motion of July 9, 1968 for a preliminary injunction directing the issuance of Alaska salmon net gear licenses to Plaintiff applicants and others similarly situated for the 1969 season in those cases where the sole basis for refusal of such license applications is Chapter 186 of S.L.A. 1968 and supplemental regulations; or the Plaintiffs alternatively move for a preliminary injunction enjoining prosecution of said Plaintiffs and others similarly situated for failure to have such license if such failure is based solely on the application of Chapter 186 and supplemental regulations. This Motion is based upon the original and supplemental affidavits of Rudolph Plancich of May 25, 1968 and January 16, 1969, and the affidavit of R. Boochever of January 17, 1969, and the pleadings and briefs submitted for consideration at the hearing on the various motions before the above entitled Court on February 14, 1969.

The original Motion has heretofore been denied without prejudice by Order of August 30, 1968.

With the submission of the extensive briefs and argument on the procedural and substantive merits of the case noted for February 14, 1969, it appears appropriate in view of the approaching season to renew the request for temporary relief in the event

a final determination may not be made prior to April of 1969 when season preparation must be commenced.

Plaintiffs acquiesce in the Defendants' supplementing their other briefs herein by a response directly pertaining to this renewed motion, and will move for oral argument on the motion on February 14 by separate motion submitted herewith.

Dated this 17th day of January, 1969.

Allen, DeGarmo & Leedy
and Seth W. Morrison
Faulkner, Banfield, Boochever
& Doogan
By R. Boochever
/s/ R. Boochever
of Attorneys for Plaintiffs

[Title of Court and Cause]

SUPPLEMENTAL AFFIDAVIT OF RUDOLPH PLANCICH

State of Washington
County of King—ss.

Rudolph Plancich, being first duly sworn, on oath, deposes and says:

That he is one of the above named Plaintiffs and makes this affidavit supplementing his affidavit of May 25, 1968 heretofore filed in this cause and a copy of which is attached to and made a part of this affidavit.

That Affiant is still the owner of a purse seine fishing vessel representing an investment of approximately $45,000, and desires to obtain an Alaska Commercial Purse Seine Gear License for 1969 for use in the Southeastern Area, just as he desired and applied for such a license in 1968, which application was denied in 1968 by the Defendant, Augie Reetz, as more fully appears from the attached copy of the affidavit of May 25, 1968.

That unless Affiant can soon be reasonably assured of being eligible for a 1969 gear license, he will be unable to recruit a competent crew and to obtain the necessary financing to permit his fishing operations in the Southeastern Area of Alaska during 1969. That such deprivation for 1969 will cause a loss to Affiant of from $10,000 to $20,000, which loss will be repeated in future years if the present gear license restrictions are continued in substantially their present form.

That under both the restrictions of Chapter 186 of the Alaska Session Laws of 1968 and the 1969 Commercial Fishing Regulations Section 102.09, entitled "Salmon Net Gear Licenses", considered either in conjunction or separately, Affiant would not be eligible for a net gear license in Southeastern Alaska because he has never held a purse seine gear license in that area, and he has not been employed as a commercial fisherman for any three years in that area, although he has had many years of experience as a gill net and purse seine fisherman in other areas in and out of Alaska.

That Affiant does not have reason to expect that he could receive a license under the so-called "hardship" provisions of Section 102.09 (a) (2). That he intends to apply for a gear license for the Southeastern Alaska area under the 1969 Regulations but believes that this is a futile act.

Dated this 16th day of January, 1969.

/s/ Rudolph Plancich
Rudolph Plancich

Subscribed and sworn to before me this 16th day of January, 1969.

/s/ Seth W. Morrison
Notary Public in and for the State of Washington residing at Seattle.

[Title of Court and Cause]

AFFIDAVIT OF R. BOOCHEVER

State of Washington
County of King—ss.

R. Boochever, being first duly sworn, on oath, deposes and says:

Exhibit B attached to the Complaint in the subject case is an extract from the Commercial Fisheries Regulatory Proposals of January 2, 1969 as indicated on the attached copy of the cover sheet of the Regulatory Proposals. These proposals are to be considered for final adoption, amendment, or appeal by the Board of Fish and Game at a meeting at Juneau, Alaska, starting on February 8, 1969.

Dated this 17th day of January, 1969.

/s/ R. Boochever
R. Boochever

Subscribed and sworn to before me this 17th day of January 1969.

/s/ Seth W. Morrison
Notary Public in and for the State of Washington, residing at Seattle.

Alaska Board of Fish and Game
c/o Alaska Department of Fish and Game
Subport Building, Juneau, Alaska

Commercial Fisheries Regulatory Proposals
January 2, 1969

To Be Considered for Final Adoption, Amendment or Repeal by the Board of Fish and Game at a Meeting at Juneau, Alaska, Starting on February 8, 1969

Attached for your information are proposed changes in the Regulations for Commercial Fisheries which were adopted for further consideration by the Board of Fish and Game at a meeting in Anchorage from November 30 to December 19, 1969. These proposed changes will be considered for final adoption, amendment, or repeal by the Board of Fish and Game at public proceedings in the Auditorium of the Department of Fish and Game, Subport Building, Juneau, starting at 9 AM on February 8, 1969.

Most of the attached proposals contain a reference to an original proposal number. This refers to the number of a proposal contained in the Commercial Fisheries Regulatory Proposals distributed to the public in October, 1968. These proposals had been submitted to the Board by individuals, companies, associations or the staff of the Department in October, 1968, for consideration at the December, 1968 meeting.

Pursuant to the Administrative Procedure Act, public comment is invited on these proposed changes.

Comments must be submitted to the Board in writing, as there will not be an oral public hearing at the February, 1969 meeting. Written comments should refer to specific proposal numbers and must be received by the Board on or before February 1, 1969. Please mail your written comments to the Board at the following address:

Alaska Board of Fish and Game
c/o Alaska Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Alaska Board of Fish and Game

Robert Moss, Chairman	Homer
Frank Cook, Vice Chairman	Anchorage
Glen DeSpain	Fairbanks
Don Harris	McGrath
Gordon Jensen	Petersburg
J. Ellsworth Jensen	Ketchikan
Ron Rettig	Anchorage
Harry A. Shawback	King Salmon
Don Smith	Kodiak
Mike Uttecht	Cold Bay

[Title of Court and Cause]

OPINION

Before: Walter Ely, Circuit Judge, and
Raymond E. Ulummer and James A. Von Der Heydt, District Judges.

Ely, Circuit Judge:

Plaintiffs are nonresidents of Alaska. The defendants are those authorities of the State of Alaska charged with the enforcement of Alaska regulations pertaining to fishing rights. The plaintiffs are experienced salmon fishermen, and each has pursued his occupation in certain, although not all, of the coastal waters of Alaska. Those waters are generally divided into twelve fishing regions. In 1968, Alaska adopted a certain statute under which fishing rights in the different regions were thereafter to be regulated by gear licensing requirements.[1] The word "gear," in its

[1]We set forth here the pertinent statute, chapter 186, S.L.A. 1968.

An Act

Relating to persons eligible to obtain gear licenses; and providing for an effective date.

Be it enacted by the legislature of the State of Alaska:

*Section 1. Legislative Findings. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience

pertinent meaning here, refers to the operating nets employed in the commercial harvesting of salmon. The statute undertook to confer upon the Board of Fish and Game the right to adopt additional regulations pursuant to the statute. The most recent of the regulations, those which are pertinent here, became

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requirements before issuance of salmon gear licenses to applicants.

*Sec. 2. As 16.05 is amended by adding a new section to read:

Sec. 16.05.536. Persons eligible for gear licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affdavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

*Sec. 3. As 16.05.540 is amended to read:

Sec. 16.05.540. Limitation on issuance of fishing gear licenses. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under

effective on February 12, 1969.[2] From an examination of the germane provisions of the statute quoted in the

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sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

*Sec. 4. As 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

*Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968

Actual effective date: January 1, 1969

[2]We quote here the relevant extract from the 1969 Commercial Fishing Regulations for the State of Alaska:

"Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:
Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;
If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the

margin, it is apparent that none of the plaintiffs could qualify for a salmon net gear license to fish in some of the twelve regions. In fact, their applications for the 1968 fishing season were denied under regulations less restrictive than those most recently issued.

The plaintiffs have argued that the licensing requirements are invalid as violative of both the Constitutions of the United States and the State of Alaska. There is no jurisdictional problem with the amount in controversy, and in light of the substantial federal question, our jurisdiction is initially founded on 28 U.S.C. § 1331(a). Since plaintiffs seek a declaration of the unconstitutionality of state laws and an injunction against their enforcement, our three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281, 2284. On February 14, 1919, we conducted a hearing on the defendants' motion to dismiss and motion for summary judgment and the plaintiffs' motions for injunctive relief and for summary judgment. We took the cause under advisement, and our review of the authorities has convinced us that we must deny the defendants' motions and enter summary judgment in favor of the plaintiffs. Our reasons follow.

In their motion to dismiss, the defendants suggested that there is no case or controversy because the issues

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family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource."

are moot. This contention is valid in its application to the plaintiffs' original complaint which challenged the now-expired 1968 regulations under which they were denied licenses for that season. The plaintiffs' amended complaint, however, deals squarely with the 1969 regulations and statute now in effect and under which they would clearly be prevented from obtaining the gear licenses necessary for utilizing their salmon-catching equipment in certain coastal regions that they desire. Another three-judge court of this District overruled a similar suggestion of mootness and explained its reasoning at length in *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska 1962).

The defendants also urge that we abstain from consideration of the issues in light of the questions of state law involved in the case. It is perfectly clear to us that the plaintiffs should not be penalized by our adopting the position that we should abstain from meeting the important constitutional issues presented until the Alaska state courts may at some future time be called upon to analyze the questions. Our abstention would surely deprive the plaintiffs of substantial engagement in their occupation during this year's forthcoming fishing season. This prospective injury to their economic livelihood looms too grave and irreparable to permit delay in the adjudication of their constitutional rights. Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had

been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable. See the analysis of authorities in *Zwicker v. Koota,* 389 U.S. 241, 250-51, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). In *Zwickler,* the Supreme Court stated, "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." [Citations omitted.] 389 U.S. at 251, note 14.

As we interpret the licensing scheme, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The only persons that can presently qualify for net-gear licenses are those already vested with the local privilege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960.[3] An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net-gear to catch salmon. Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his

[3]Commercial Fishing Regulations, section 102.09(a)(1) (A), (B)(1969), note 2, *supra.* No other entries into the salmon fishing industry in any coastal region are permitted except the narrowly prescribed class of extreme hardship cases as limited in section 102.09(a)(2)(1969), also quoted in note 2, *supra.* Under this "hardship" provision, a licensee would be empowered to assign his license to anyone, regardless of whether or not the assignee had any fishing experience whatsoever.

own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interests of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud,*[4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

> "In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police

[4]354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

> laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.
>
> "To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" [Citations omitted.]

354 U.S. at 463-64, citing other controlling authorities; see *Mayhue v. City of Plantation*, 375 F. 2d 447, 450-51 (5th Cir. 1967); *cf. Levy v. Louisiana*, 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless,

we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary "prior experience" in the industry in the hands of private citizens now eligible for the required license. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the "experience" necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life.

Although we would have preferred that the Alaska courts should have had the first opportunity to so hold, we must also now declare that the licensing scheme violates the Alaska Constitution, which, in its Article VIII, provides:

> "Section 3. *Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural water of the State."

The Attorney General of Alaska, in an Opinion directed to the Commissioner of the Department of Fish and Game, dated February 9, 1968, emphasized the unconstitutionality of a proposed and essentially similar licensing requirement which would have restricted area licenses to those license-holders within the same

area in the past two years. The Attorney General relied on *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which 1933 salmon gear licenses were issued only to those who had held licenses in 1931 or 1932. He set forth the legislative history of section 15, *supra,* demonstrating that the provision was based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska fisheries were regulated prior to Alaska's statehood. The leading case considering the White Act is *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949). The Secretary of the Interior had ordered certain Alaska waters closed to fishing by all except those of the Karluk Indian Reservation and their licensees. The Supreme Court in *Hynes* held that the White Act prohibited fishing grants to special groups or numbers of people. We read, at 120-22:

> "Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves. . . .
>
> "For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted. . . . [W]e are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character. . . .
>
> "We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights."

The Attorney General of Alaska also ruled that the Board of Fish and Game could not be given the delegated authority, in the absence of guiding standards prescribed by other provisions of law, to specify certain prior years as the test for whether salmon gear licenses would be issued. Here, the Board has set specific years in the 1960's, although no guidelines are included in the 1969 statutory scheme. In this connection, it is pertinent to note that the Attorney General's Opinion was explicitly made applicable to section 102.09, the forerunner of the section 102.9 regulations set out in footnote 2, *supra*.

The Alaska legislature apparently attempted to avoid the impact of Attorney General Boyko's Opinion by ostensibly providing an avenue by which a commercial licensee might, after three years with such an area license, obtain a salmon gear license in the particular area. The fact that he might do so, even though he could never, without the aid of an established net-gear licensee, have previously gained experience in the area with gear essential to commercial salmon fishing does not harmonize with the defendants' argument that the challenged scheme is designed to promote safe operations by experienced fishermen. It appears to us that the "escape" avenue offers nothing beyond an illusory hope to non-established salmon fishermen seeking to ply their trade in a new area.

There is no saving difference between the present licensing scheme and that to which the Attorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable

by the framers of Alaska's Constitution. As a properly constituted three-judge court, we have jurisdiction to consider all legal attacks upon the statute. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80-81, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960). We therefore conclude that the 1969 salmon net-gear licensing statute and its consequent regulations cannot survive the requirements of the equal protection clause of the Constitution of the United States or those of the Constitution of Alaska.

In oral argument the defendants argued that summary judgment for the plaintiffs would be improper because the decision of the court might rest upon facts to be proved in plenary proceedings. Pressed for a definition of such anticipated proof, defendants' counsel was unable to specify, with any reasonable precision, any genuine issue of fact. Moreover, any genuine issue of fact, the resolution of which might control the disposition of the controversy, is required by Rule 5(H)(2)[5] of this court to be disclosed by written statement not later than three days prior to the hearing on a motion for summary judgment. The defendants did not, within the time allowed by this rule, or ever, file the required statement. This corroborates our conclusion that no genuine disputed issue of fact remains. Counsel did orally suggest that the

[5]This rule, as amended March 1, 1967, reads as follows:

"(2) Any party opposing the motion [for summary judgment] shall, not later than three (3) days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

defendants might offer proof that
erations of conservation inspired th
challenged regulatory scheme. Such
it might be, could not alter the
worthy or desirable may have beer
hind the legislation, they cannot cur
stitutional infirmities.

Accordingly, we deny the defen
dismiss and for summary judgmer
plaintiffs' motion for summary ju
forcement of the 1969 statute and
question is permamently enjoined.
will prepare and submit a propos
ment.[6]

Dated this 26th day of February

/s/ Walter Ely
United States C
/s/ Raymond E
United States D
/s/ James A. v
United States D

Certified to be a true and correc
filed in my office. Dated 2-26-69.

(Seal) J. M. Kroninger, Cl
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District of Ala

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sed form of judg-

y, 1969.

Circuit Judge
E. Plummer
District Judge
von der Heydt
District Judge

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lerk.
Filed Feb. 26, 1969,
District Court,
aska.

[6]Findings of fact and conclusions of law
a disposition is made, such as here, by
Fed. R. Civ. P. 52(a). Our opinion recite
and legal considerations which bear upo
we have been impelled.

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[Title of Court and Cause]

DECREE

This matter having come on for hearing before the undersigned judges duly convened pursuant to 28 USCA § 2281, et seq., on February 14, 1969, on defendants' motion to dismiss and motion for summary judgment and the claimants' motions for injunctive relief and for summary judgment, and the plaintiffs appearing through Robert Boochever of Faulkner, Banfield, Bootchever & Doogan and Seth W. Morrison of Allen, DeGarmo & Leedy, and the defendants appearing through G. Kent Edwards, Attorney General of the State of Alaska, by Charles Cranston, Assistant Attorney General, and briefs and affidavits having been submitted and the court having heard argument of counsel and having entered its opinion dated February 26, 1969, and good cause having been shown,

It Is Ordered, Adjudged and Decreed as follows:

1. Defendants' motion to dismiss and motion for summary judgment be, and the same are, denied;

2. Plaintiffs' motion for summary judgment be, and the same is, hereby granted;

3. Chapter 186 Session Laws of Alaska, 1968, and Section 102.09 of the 1969 Alaska Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska;

4. Defendants, their successors in office and all persons acting as their agents, officers and servants or

under their direction or authority, be, and they are, permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Session Laws of Alaska of 1968, and from denying fishing gear licenses by reason of the authority thereof.

Dated this 20th day of March, 1968.

/s/ Walter Ely
United States Circuit Judge
/s/ Raymond E. Plummer
United States District Judge
/s/ James A. von der Heydt
United States District Judge

Copy received
March 5, 1969
and approved as to form.
Charles K. Cranston
Assistant Attorney General
of Attorneys for Defendants.

ADDITIONAL SELECTED ALASKA COMMERCIAL FISHING STATUTES AND REGULATIONS

Alaska Statutes

Sec. 16.05.480. *Commercial Fishing License.* (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $10 for residents, and $30 for non-residents. All commercial fishing licenses are non-transferable and shall be retained in the possession of the licensee, readily accessible for inspection at all times.

Sec. 16.05.540. *Limitation on issuance of fishing gear licenses.* The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

Sec. 16.05.670. *Fishing gear license in general.* (a) A fishing gear license issued under secs. 550, 560, and 590-650 of this chapter may be transferred only if sickness, injury, death, unavailability or other incapacitation of the licensee keep or may keep a commercial fishing vessel in port because of the lack of other licensed fishing gear to take its place. A fishing gear license issued under secs. 570 and 580 of this chapter may be transferred only if sickness, injury, or death of the licensee keep or may keep a commercial fishing

vessel in port because of the lack of other licensed fishing gear to take its place. . . . (e) It is unlawful for gear which is licensed as provided in this chapter to be operated or caused to be operated by a person other than the licensee or the person to whom the license was transferred upon notice to the department.

Alaska Administrative Code

5 AAC 39.110. Commercial Fishing Licenses and Registration.

(a) All commercial fishermen shall have their commercial fishing licenses before fishing in any waters of Alaska.

(b) Not more than one commercial fishing license may be obtained by a person during any one calendar year.

(c) The following provisions apply to salmon net fishermen:

(1) Each salmon net fisherman shall be properly licensed, and registered in the registration area of the fisherman's choice as set out in sec. 120(d)(1) of this chapter.

(2) The license shall be valid for salmon net fishing only in the area that appears on the license.

(3) Upon request, the commissioner shall permit the license to be transferred to another registration area if the fisherman does not hold a salmon net gear license in either area and such transfer will not jeopardize proper conservation.

5 AAC 39.120. Licenses and Registration of Fishing Vessels and Gear.

(a) No person may operate a vessel and gear to take fish in an area of intended operation unless the vessel and gear have been registered with the local representative of the department. Registration, with the exception of salmon net and king crab fishing, may be done any time to commencing fishing. This does not apply to halibut fishing.

(b) Salmon fishing net and vessel license and registration requirements are as follows:

(1) No person may operate a net, and vessel used to take salmon with such net, unless the net and vessel are properly licensed and registered not later than April 15 of the year of operation for the registration area selected, except in the Arctic-Yukon-Kuskokwim area where the registration date shall be June 1 for the Yukon district. In the remainder of the Arctic-Yukon-Kuskokwim area, registration shall be at any time before commercial fishing.

(2) Registered nets and vessels shall be used to take salmon only in the one area for which they are registered.

(3) The late registration, or the transfer of registered nets or vessels to another registration area shall be permitted by the commissioner only in the case of serious injury, sickness or death, or loss of vessel by sinking, destruction or extensive mechanical breakdown.

. . .

(d) Each registration area shall be assigned a code letter. The registration areas are described as follows:

(1) Salmon registration areas are:

Code Letter — Area

A — Southeastern Alaska area

D — Yakutat area

E — Prince William Sound area, Copper River-Bering River area and the Yakataga district of the Yakutat area

K — Kodiak area

L — Chignik area

M — Alaska Peninsula area and Aleutian Islands area

T — Bristol Bay area, and after August 1 and before June 15, the Cinder River, Port Heiden and Ilnik sections of the Northern district of the Alaska Peninsula area

W — Kuskokwim district of the Arctic-Yukon-Kuskokwim area

X — Kotzebue district of the Arctic-Yukon-Kuskokwim area.

Y — Yukon district of the Arctic-Yukon-Kuskokwim area

Z — Norton Sound district of the Arctic-Yukon-Kuskokwim area.

Supreme Court of the United States

No. 185 ---, *October Term, 19* 69

Augie Reetz, Commissioner of Fish and Game for Alaska, et al.,

Appellants,

v.

John Bosanich et al.

APPEAL from the United States District Court for the District of Alaska.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. This case is set for oral argument with No. 301 in which jurisdiction was noted today.

October 13, 1969

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. [redacted] 185

Office Supreme Court, U.
FILED
MAY 31 1969
JOHN F. DAVIS, CLERK

[redacted]

Appellants,

-vs-

[redacted]

Appellees.

Appeal from the United States District Court
for the District of Alaska

STATEMENT AS TO JURISDICTION

G. KENT EDWARDS,
Attorney General of the State of Alaska,

ROBERT L. HARTIG,
Assistant Attorney General of the State of Alaska,
Pouch K, Capitol Building,
Juneau, Alaska 99801.

Attorneys for Appellees.

[redacted] PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No.

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; ROBERT MOSS, Chairman; and MIKE UTTECHT, HARRY A. SHAWBACK, FRANK COOK, DON ELLSWORTH JENSEN and GORDON JENSEN, Members of the Board of Fish and Game for the State of Alaska.

Appellants,

-vs-

JOHN BOZANICH, ANDY NESS, RUDOLPH PLANCICH, ALAN TAKALO and WILLIAM WHITE

Appellees,

Appeal from the United States District Court for the District of Alaska

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a

direct appeal to review the final decree granting appellees' Motion for Summary Judgment and a Permanent Injunction denying appellants' motion to dismiss or in the alternative to abate, and denying appellants' motion for summary judgment, and to exercise jurisdiction in this case.

OPINION BELOW

The District Court delivered a written opinion, a copy of which is attached to this Jurisdictional Statement. The District Court made no findings of fact and conclusions of law on the basis that they are not required when a disposition is made upon summary judgment, Federal Rule of Civil Procedure 52(a). The District Court filed its opinion on February 26, 1969 and entered the decree in question on the 20th day of March, 1969, a copy of which is attached to this Jurisdictional Statement.

JURISDICTION

The appeal herein is from a final decree made and entered by the United States District Court for the District of Alaska, specially constituted as a District Court of three judges pursuant to the provisions of 28 U.S.C. Sec. 2284, upon the appellees' application for a temporary and permanent injunction to restrain the enforcement, operation or execution of the statute of the State of Alaska, to wit, Chapter 186, Session Laws of Alaska 1968 (hereinafter referred to as Ch. 186, SLA 1968), also known as Sections 16.05.536,

16.05.540 and 16.05.250 of Alaska Statutes, as amended by Ch. 186, Laws of Alaska 1968. Appellees alleged that Ch. 186, SLA 1968 was repugnant to the Equal Protection clause and the Due Process clause of the Fourteenth Amendment to the Constitution of the United States and repugnant to Art. VIII, Sec. 15 of the Alaska Constitution which prohibits the creation of an exclusive fishery and Art. I, Sec. 1 of the Alaska Constitution which guarantees to all persons equal protection under the law, and Art. I, Sec. 7 of the Alaska Constitution which provides that no person shall be deprived of life, liberty or property without due process of law and Art. VIII, Sec. 3 of the Alaska Constitution which reserves all fish, wildlife and waters to the people for the common use, and Art. VIII, Sec. 17 of the Alaska Constitution which provides that laws and regulations governing the use of natural resources shall apply equally to all persons similarly situated. Similar claims were made in respect to section 102.09 of the 1969 Alaska Commercial Fishing Regulations.

The final decree appealed from was made and entered on March 20, 1968. Notice of appeal was filed in the United States District Court for the District of Alaska on April 3, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C., Sections 1253 and 2101(a). The following decision is believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this

case. *Florida Lime and Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1959).

The statute of the State of Alaska that is involved is Ch. 186, Alaska Statutes 1968, which provides as follows:

Section 1. Legislative findings. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. Persons Eligible For Gear Licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of the three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. Limitation on Issuance of Fishing Gear Licenses. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area

in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

The regulation of the State of Alaska that is involved in Sec. 102.09 of the 1969 Commercial Fishing Regulations for the State of Alaska. That regulation provides in part as follows:

Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship: Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death; If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource.

The District Court held the statute and regulation in question to be unconstitutional under the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States and Sec. 3, Article VIII of the Alaska Constitution, which reserves fish and in their natural state to the people for com-

mon use and Sec. 15, Article VIII of the Alaska Constitution which prohibits the granting of an exclusive right of fishery.

The District Court also denied appellants' motion that the three Judge Court abstain from consideration of the State constitutional issues until the Alaska State Courts should decide the Alaska constitutional issues.

QUESTIONS PRESENTED

1. Do the statutory and regulatory provisions separately or taken together violate the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States?

Ch. 186, SLA 1968 insofar as its provisions are pertinent to this action, may be summarized as follows:

(a) Section 1 of the Act contains legislative findings to the effect that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear, creating difficulties in conserving and managing the resource; and that the uninhibited issuance of gear licenses to anyone notwithstanding the lack of experience of the licensee has been the prime factor tending toward accumulation of excessive gear and has posed management, enforcement and public safty problems in Alaska's salmon fishing waters.

(b) Section 2 of the Act provides that a salmon net gear license for a specific salmon registration area

may be issued only to a person who has previously held a salmon net gear license for the specific area or who has for any three years held a commercial fishing license, and while so licensed actively engaged in commercial fishing in the specific area. There are 12 salmon registration areas in the State of Alaska.

(c) Section 4 of the Act permits the Board of Fish and Game of the State of Alaska to establish additional qualifications relating to the eligibility requirements necessary for the issuance of salmon net gear licenses.

Section 102.09 of the 1969 Commercial Fishing Regulations for the State of Alaska provides that a person would be eligible for a salmon net gear license in a specific area if he had held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area or had for any three years since January 31, 1960 held a commercial fishing license and while still licensed actively engaged in commercial fishing in that specific salmon registration area.

2. Whether the District Court properly denied appellants' motion to dismiss or in the alternative to abate.

Section 3, Article VIII of the Alaska Constitution provides as follows:

> "Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Article VIII, Sec. 15 of the Alaska Constitution provides as follows:

> "No Exclusive Right of Fishery. No exclusive right or special privilege of fisheries shall be created or authorized in the natural waters of the state."

Appellees alleged that the statutory and regulatory provisions here in question violated the quoted State constitutional provisions. On September 16, 1968, defendants filed a motion to dismiss the action, or in the alternative to stay the proceedings pending the determination by the Alaska Court System of the constitutionality of the statutes and regulation in question in the light of the above quoted Alaska constitutional provisions. In its decree herein filed March 20, 1969, the District Court denied defendants' motion to dismiss or in the alternative to stay proceedings pending the determination of the State constitutional issues by the Alaska Court System.

3. Are Ch. 186, SLA 1968 and Section 102.09 of the 1969 Commercial Fishing Regulations of the State of Alaska unconstitutional under the foregoing quoted provisions of the Alaska State Constitution?

4. Did the District Court grant appellees' motion for summary judgment upon facts not properly before it?

In its opinion filed on February 26, 1969, at page 5, line 10, the District Court states:

> "An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net gear to catch salmon. Thus, if an outsider wishes

> to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area."

The Court further stated at page 5, line 23:

> "Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire."

The opinion and the facts recited therein constituted the basis upon which the District Court granted appellees' motion for summary judgment. The facts upon which the above quoted statements depend were not contained in the affidavits, answers to interrogatories, or other evidentiary documents before the Court.

5. Was appellees' motion for summary judgment granted despite the existence of genuine issues as to material facts?

6. Are appellees entitled to summary judgment as a matter of law?

7. Did the District Court grant appellees' motion for summary judgment in accordance with Rule 56, Federal Rules of Civil Procedure?

8. Did appellees fully comply with Rule 56, Federal Rules of Civil Procedure?

9. Should appellants be permanently enjoined and restrained from taking any action to place into effect, to continue into effect, or otherwise invoke or enforce Sec. 102.09 of the Alaska Commercial Fishing Regulations, 1969 and Ch. 186, Session Laws of Alaska 1968?

10. Did the District Court properly deny appellants' motion for summary judgment?

STATEMENT OF THE CASE

The Fifth Legislature of the State of Alaska, Second Session, passed in 1968 Ch. 186, Session Laws of Alaska, 1968. The text of the statute is attached to this Jurisdictional Statement. In 1968 the Board of Fish and Game of the State of Alaska promulgated Sec. 102.09 of the 1968 Commercial Fishing Regulations relating to salmon net gear licenses. On July 5, 1968, appellees, nonresidents of the State of Alaska, and previous holders of salmon net gear commercial licenses, filed their complaint herein. The complaint was based in large part upon the existence of Sec. 102.09, 1968 Commercial Fishing Regulations relative to salmon net gear of the State of Alaska. Because of the lapse of time during the pendency of this action, a substantial portion of the matters alleged in appellees' complaint became moot and are not relevant to this appeal. On January 6, 1969, appellees moved for relief to file an amended complaint. The appellants stipulated that the amended complaint could be filed upon compliance with certain conditions. On February

14, 1969, the Court allowed the filing of appellees' amended complaint. Insofar as pertinent to this appeal the amended complaint alleged that the appellees had applied for a 1968 license authorizing their operation of salmon net gear for commercial fishing in Alaskan waters and that the application for such licenses had been denied. Appellees alleged further that because of the operation of Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1969 Commercial Salmon Fishing Regulations of the State of Alaska, they could not qualify for salmon net gear licenses. Appellees further alleged in their complaint that as a result of the statutory and regulatory provisions relative to the issuance of a State of Alaska commercial salmon net gear license, they were deprived of equal protection of the laws under Sec. 1, Article IV of the Amendments of the Constitution of the United States of America, and further that they were denied rights provided them by Article VIII, Sec. 15 and Article VIII, Sec. 3 of the Constitution of the State of Alaska.

In support of matters alleged in the complaint and also in support of appellees' motion for summary judgment filed on December 2, 1968, Rudolph Plancich, one of the appellees, filed a supplemental affidavit on January 20, 1969. The supplemental affidavit of Rudolph Plancich stated that he was the owner of a purse seine fishing vessel representing an investment of approximately $45,000.00 and desired to obtain an Alaska commercial purse seine gear license for 1969 for use in Southeast Alaska. He was denied issuance

for such license in 1968. The affidavit further stated that because of the application of Ch. 186, SLA 1968 and Sec. 102.09 of the Alaska 1969 Commercial Fishing Regulations, that he would not be eligible for issuance of a net gear license in Southeast Alaska in 1969.

The affidavit stated also that as a result of affiant's inability to obtain a salmon gear license for fishing operations in the Southeast Alaska waters in 1969, he would suffer losses in the amount of $10,000.00 to $20,000.00 and that these losses would continue during each year he was denied the issuance of the license.

On September 16, 1968, appellants filed a motion to dismiss, or in the alternative, to stay the proceedings in the United States District Court pending the determination by the Alaska State Court System of issues involving Alaska constitutional law. The specific issues of Alaska constitutional law which appellants urged as proper for determination by the Alaska State Court System were the effect of Article VIII, Sections 3 and 15 of the Alaska State Constitution. The United States District Court set the time for hearing on appellants' motion to dismiss, or in the alternative, to abate and on all motions presently pending. The time for hearing was continued until February 14, 1969, at which time all motions then pending were heard by the Court.

On November 6, 1968 appellants filed a motion for summary judgment and suggestion of mootness. The appellants urged that Sec. 102.09 of the 1968 Commercial Fishing Regulations of the State of Alaska were as of the date of the motion, November 6, 1968,

of no further force and effect. The motion for summary judgment was based upon the fact that there was no actual controversy between the parties relative to the applicability or constitutionality of Ch. 186, SLA 1968. Appellants asserted that as of the date of the motion, appellees had not applied for and consequently had not been denied, salmon net gear licenses for 1969. Ch. 186, SLA 1968 governed the issuance of salmon net gear licenses only for 1969 and subsequent years. The issuance of the 1969 licenses was governed in part by regulations to be enacted by the Alaska State Board of Fish and Game subsequent to the date of the motion. The motion for summary judgment was supplemented by the affidavit of Augie Reetz, Commissioner of the Alaska Department of Fish and Game, to the effect that none of the appellees had filed applications for issuance of 1969 commercial salmon net gear licenses for the State of Alaska and that the 1968 commercial salmon net gear fishing regulations for the State of Alaska were no longer in force and effect. The affidavit further stated that the regulations of the Alaska Board of Fish and Game governing the issuance of 1969 commercial salmon net gear licenses had not yet been enacted.

On February 14, 1969, the matters raised in appellants' motion for summary judgment were heard. The decree filed March 20, 1969, denied appellants' motion for summary judgment, and denied appellants' motion to dismiss or abate.

On December 2, 1968 appellees filed a motion for summary judgment on the basis that as a matter of

law the statutory and regulatory provisions relative to the issuance of Alaska commercial salmon net gear fishing licenses deprived appellees, among other things, of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and rights granted by Article VIII, Secs. 3 and 15 of the Alaska Constitution. Appellees' motion for summary judgment was heard on February 14, 1969 and granted by the decree of the District Court filed March 20, 1969.

The decree of the Court filed March 20, 1969 ordered as follows:

1. That appellants' motion to dismiss and motion for summary judgment be and the same are denied.

2. Appellees' motion for summary judgment be and the same is hereby granted.

3. Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1968 Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska.

4. That appellants, their successors in office and all persons acting as their agents, officers and servants or under their direction and authority be and they are permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce part 102.09 of the Alaska Salmon Commercial Fishing Regulations in the aforesaid Ch. 186, Session Laws of Alaska 1968, and from denying fishing gear licenses by reason of the authority thereof.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Federal Constitutional Question.

The District Court has held that Ch. 186, SLA 1968 and Sec. 102.09 of the 1969 Commercial Salmon Net Gear Fishing Regulations of the State of Alaska deprive appellants of equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. At the outset it must be noted that the State of Alaska is attempting to regulate by the contested statutory and regulatory provisions the manner in which one of its important natural resources, salmon, may be harvested.

When a State is found to have violated the Federal Constitution in an attempt to regulate, manage, and conserve one of its important resources, the constitutional issue presented must of necessity be substantial. This fact is particularly underscored in the present case where the legislative findings upon which the provisions of Ch. 186, SLA 1968 are based are to the effect that the accumulation of excessive salmon net gear has posed management, enforcement and public safety problems in particular salmon fishing areas. The Supreme Court of the United States has decided numerous cases involving the applicability of the Equal Protection clause of the Fourteenth Amendment to state regulation, *Morey v. Doud,* 354 U.S. 457 (1957), *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911), *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955), *McGowan v. Maryland,* 366 U.S. 420 (1961). The Supreme Court, in taking cases such as those named under considera-

tion, has determined that matters involving the application of the Equal Protection clause of the Fourteenth Amendment to state regulatory statutes involved substantial federal issues. The substantiality of the federal question is made clear by the fact that none of the above cited cases relate directly to the power of a state to regulate entry into its commercial fishing industry.

The State of Alaska asserts that the classification created by the statutory and regulatory scheme is reasonable in the light of the State's objective of insuring conservation and management of its salmon fishing resources. It is of crucial importance that the State of Alaska have the United States Supreme Court determine the validity of its approach in this matter.

B. The Question as to Whether There is an Actual Controversy Between the Parties Which Should be the Subject of Declaratory Relief.

Appellees brought their action asking for declaratory relief under the provisions of 28 U.S.C. Sec. 2201. That section states that

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought."

The authority of the United States District Court to decide the issues presented to it depends upon the

existence of an actual controversy between the parties. Appellants asserted in the District Court that there was no actual controversy between the parties and that therefore appellees' action should be dismissed. The United States Supreme Court has decided, cases involving the question as to whether or not there was an actual case in controversy between the parties, *Muskrat v. United States,* 219 U.S. 246 (1910), *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1947). It is the proper function of the United States Supreme Court to determine and insure that United States District Courts decide cases which are only properly before those courts. Thus, it is a substantial federal question whether or not the District Court has properly exercised its jurisdiction and authority in these cases. Appellants assert that in this case the United States District Court did not properly have before it a case involving an actual controversy between the parties. The matter should therefore be resolved and decided by the United States Supreme Court.

C. Dismissal of Appellees' Action by the United States District Court or Abatement of the Action Pending Determination of the State Constitutional Issues by the Alaska State Court System.

As noted earlier, appellees, in addition to alleging that the statutory and regulatory provisions involved in this action violated the Fourteenth Amendment of the United States Constitution, alleged that the same provisions violated certain constitutional provisions of the State of Alaska. Appellants filed a motion that appellees' action be dismissed, or in the alternative

abated until such time as the Alaska State Court System had an opportunity to pass on the State constitutional issues. Appellants felt that such a determination was necessary in that the issues raised by appellees were a matter of first impression in respect to the Alaska State constitutional provisions. The United States District Court denied appellants' motion to dismiss or abate and, in addition to its ruling that the statutory and regulatory provisions here in question violated the Federal Constitution, specifically ruled that the statutory and regulatory provisions violated Sections 3 and 15 of Article VIII of the Alaska State Constitution. See pages 9-10 herein for the text of those provisions. Appellants' motion to abate was based on the federal doctrine of abstention as set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). It must be noted that in deciding the issue presented in the *Pullman Co.* case, the Supreme Court must, of necessity, have noted that a substantial federal question was presented when the issue of the application of the doctrine of abstention is involved. See also *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951). The importance of the question presented is further underscored when it is considered that unless the United States Supreme Court considers this particular issue, appellants are deprived of any appeal relative to the application of the doctrine of abstention and relative to the determination of the State constitutional issues. The applicability of Sections 3 and 15 of Article VIII of the Alaska State Constitution to the statutory and regulatory

provisions in question herein was first raised before the three-man United States District Court. The United States District Court ruled that the Alaska statutory and regulatory provisions violated the quoted Alaska constitutional sections. Unless the United States Supreme Court assumes jurisdiction to decide whether or not appellants' motion to abate was properly denied, the decision of the United States District Court must forever remain unassailable. Thus, an important question as to the relationship between the State Court System and the Federal Court System is involved. The existence of the question and the context in which it is represented raises a substantial federal question which must be determined by the United States Supreme Court.

In the event that the United States Supreme Court should determine that the District Court properly denied appellants' motion to abate, the Supreme Court should then decide upon the applicability of Sections 3 and 15 of Article VIII of the Alaska Constitution to the statutory and regulartory provisions here in question. Only in this manner may the determination of the District Court on this point be reviewed by an appellate court. The United States Supreme Court has jurisdiction to review this aspect of the decision, *Siler v. Louisville and Nashville Railroad Co.*, 213 U.S. 175 (1909).

D. The Granting of Appellees' Motion for Summary Judgment.

The final decree in this case was based upon a hearing on all of the motions presently pending before the

Court on February 14, 1969. One of those motions was appellees' motion for summary judgment which was granted. In granting appellees' motion for summary judgment the Court determined that the statutory and regulatory provisions of the State of Alaska violated the Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. The Court based its decision upon the fact that "Under this scheme entry into the salmon fishing industry is controlled not by the State, but by local fishermen in each area who are eligible for gear licenses and choose among the commercial fishermen, if any, that they might wish to hire." (Opinion, Appendix page vii.) Appellants assert that the Court had no evidence before it whether in the form of affidavits, answers to interrogatories, or any other items which may be considered by a Court on summary judgment, upon which it could base the above quoted statement.

Federal Rule of Civil Procedure 56 provides the procedure with respect to summary judgment. Rule 56(e) sets forth the items which may be considered by the Court in a ruling upon the motion. The statement above quoted from the Court's opinion, upon which the Court heavily relied in granting appellees' motion for summary judgment, did not appear in the form of any document noted in Rule 56(e). Thus, a substantial federal question is presented for determination by this Court. The question presented is whether or not the United States District Court may consider matters not properly before it in order to

rule upon a motion for summary judgment. The matter is substantial because the issue goes to the heart of the practice upon which summary judgments would be granted or denied.

CONCLUSION

Since this case is one required to be heard by a District Court of three Judges, the Supreme Court has jurisdiction of the case on appeal, and that jurisdiction extends to every question involved in the case, *Sterling v. Constantine,* 287 U.S. 378, 393, 394 (1932); *Siler v. Louisville and Nashville Railroad Co.,* 213 U.S. 175 (1909); and *Horner v. United States,* 143 U.S. 570, 576, (1892).

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1253, United States Code.

Dated this 27th day of May, 1969.

G. KENT EDWARDS,
Attorney General of the State of Alaska,
By ROBERT L. HARTIG,
Assistant Attorney General of the State of Alaska,
Attorneys for Appellees.

(Appendix Follows)

Appendix

In the United States District Court
for the District of Alaska

No. J-5-68

John Bozanich, et al.,
Plaintiffs,

vs.

Augie Reetz, Commissioner of Fish and Game for the State of Alaska, et al.,
Defendants.

Opinion

Before: Walter Ely, Circuit Judge, and Raymond E. Plummer and James A. Von Der Heydt, District Judges.

Ely, Circuit Judge:

Plaintiffs are nonresidents of Alaska. The defendants are those authorities of the State of Alaska charged with the enforcement of Alaska regulations pertaining to fishing rights. The plaintiffs are experienced salmon fishermen, and each has pursued his occupation in certain, although not all, of the coastal waters of Alaska. Those waters are generally divided into twelve fishing regions. In 1968, Alaska adopted

a certain statute under which fishing rights in the different regions were thereafter to be regulated by gear licensing requirements.[1] The word "gear," in its

---

[1]We set forth here the pertinent statute, chapter 186, S.L.A. 1968:

AN ACT

Relating to persons eligible to obtain gear licenses; and providing for an effective date.

Be It Enacted by the Legislature of the State of Alaska:

• Section 1. Legislative Findings. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

• Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. Persons Eligible for Gear Licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires

pertinent meaning here, refers to the operating nets employed in the commercial harvesting of salmon. The statute undertook to confer upon the Board of Fish and Game the right to adopt additional regulations pursuant to the statute. The most recent of the regulations, those which are pertinent here, became effective on February 12, 1969[2]. From an examination of the germane provisions of the statute, quoted in the

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to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

• Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. Limitation on Issuance of Fishing Gear Licenses. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

• Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

• Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968
Actual effective date: January 1, 1969

[2]We quote here the relevant extract from the 1969 Commercial Fishing Regulations for the State of Alaska:

"Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license

margin, it is apparent that none of the plaintiffs could qualify for a salmon net gear license to fish in some of the twelve regions. In fact, their applications for the 1968 fishing season were denied under regulations less restrictive than those most recently issued.

The plaintiffs have argued that the licensing requirements are invalid as violative of both the Constitutions of the United States and the State of Alaska. There is no jurisdictional problem with the amount in controversy, and in light of the substantial federal question, our jurisdiction is initially founded

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for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;

If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource."

on 28 U.S.C. § 1331(a). Since plaintiffs seek a declaration of the unconstitutionality of state laws and an injunction against their enforcement, our three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281, 2284. On February 14, 1969, we conducted a hearing on the defendants' motion to dismiss and motion for summary judgment and the plaintiffs' motions for injunctive relief and for summary judgment. We took the cause under advisement, and our review of the authorities has convinced us that we must deny the defendants' motions and enter summary judgment in favor of the plaintiffs. Our reasons follow:

In their motion to dismiss, the defendants suggested that there is no case or controversy because the issues are moot. This contention is valid in its application to the plaintiffs' original complaint, which challenged the now-expired 1968 regulations under which they were denied licenses for that season. The plaintiffs' amended complaint, however, deals squarely with the 1969 regulations and statute now in effect and under which they would clearly be prevented from obtaining the gear licenses necessary for utilizing their salmon-catching equipment in certain coastal regions that they desire. Another three judge court of this District overruled a similar suggestion of mootness and explained its reasoning at length in *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska 1962).

The defendants also urge that we abstain from consideration of the issues in light of the questions of

state law involved in the case. It is perfectly clear to us that the plaintiffs should not be penalized by our adopting the position that we should abstain from meeting the important constitutional issues presented until the Alaska state courts may at some future time be called upon to analyze the questions. Our abstention would surely deprive the plaintiffs of substantial engagement in their occupation during this year's forthcoming fishing season. This prospective injury to their economic livelihood looms too grave and irreparable to permit delay in the adjudication of their constitutional rights. Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable. See the analysis of authorities in *Zwickler v. Koota,* 389 U.S. 241, 250-51, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). In *Zwickler,* the Supreme Court stated, "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." [Citations omitted.] 389 U.S. at 251, note 14.

As we interpret the licensing scheme, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The only persons that can presently qualify for net-gear licenses are those already vested with the local privi-

lege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960[3]. An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net-gear to catch salmon. Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interests of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

---

[3]Commercial Fishing Regulations, section 102.09(a)(1)(A), (B)(1969), note 2, *supra*. No other entries into the salmon fishing industry in any coastal region are permitted except the narrowly prescribed class of extreme hardship cases as limited in section 102.09(a)(2) (1969), also quoted in note 2, *supra*. Under this "hardship" provision, a licensee would be empowered to assign his license to anyone, regardless of whether or not the assignee had any fishing experience whatsoever.

We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud,*[4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

> "In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79.

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[4]354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provisions.'" [Citations omitted.]

354 U.S. at 463-64, citing other controlling authorities; *see Mayhue v. City of Plantation,* 375 F.24 447, 450-51 (5th Cir. 1967); *cf. Levy v. Louisiana,* 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless, we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary "prior experience" in the industry in the hands of private citizens now eligible for the required licenses. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the "experience" necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life.

Although we would have preferred that the Alaska courts should have had the first opportunity to so hold, we must also now declare that the licensing scheme violates the Alaska Constitution, which, in its Article VIII, provides:

> "Section 3. *Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The Attorney General of Alaska, in an Opinion directed to the Commissioner of the Department of Fish and Game, dated February 9, 1968, emphasized the unconstitutionality of a proposed and essentially similar licensing requirement which would have restricted area licenses to those license-holders within the same area in the past two years. The Attorney General relied on *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which 1933 salmon gear licenses were issued only to those who had held licenses in 1931 or 1932. He set forth the legislative history of section 15, *supra,* demonstrating that the provision was based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska fisheries were regulated prior to Alaska's statehood. The leading case considering the White Act is *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949). The Secretary of the Interior had ordered certain Alaska waters closed to fishing

by all except those of the Karluk Indian Reservation and their licensees. The Supreme Court in *Hynes* held that the White Act prohibited fishing grants to special groups or numbers of people. We read, at 120-22:

> "Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves. . . .
>
> "For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted. . . . [W]e are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character . . . .
>
> "We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights."

The Attorney General of Alaska also ruled that the Board of Fish and Game could not be given the delegated authority, in the absence of guiding standards prescribed by other provisions of law, to specify certain prior years as the test for whether salmon gear licenses would be issued. Here, the Board has set specific years in the 1960's, although no guidelines are included in the 1969 statutory scheme. In this connection, it is pertinent to note that the Attorney General's Opinion was explicitly made applicable to

section 102.09, the forerunner of the section 102.09 regulations set out in footnote 2, *supra*.

The Alaska legislature apparently attempted to avoid the impact of Attorney General Boyko's Opinion by ostensibly providing an avenue by which a commercial licensee might, after three years with such an area license, obtain a salmon gear license in the particular area. The fact that he might do so, even though he could never, without the aid of an established net-gear licensee, have previously gained experience in the area with gear essential to commercial salmon fishing does not harmonize with the defendants' argument that the challenged scheme is designed to promote safe operations by experienced fishermen. It appears to us that the "escape" avenue offers nothing beyond an illusory hope to non-established salmon fishermen seeking to ply their trade in a new area.

There is no saving difference between the present licensing scheme and that to which the Attorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable by the framers of Alaska's Constitution. As a properly constituted three-judge court, we have jurisdiction to consider all legal attacks upon the statute. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80-81, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960). We therefore conclude that the 1969 salmon net-gear licensing statute and its consequent regulations cannot survive the requirements of the equal

protection clause of the Constitution of the United States or those of the Constitution of Alaska.

In oral argument the defendants argued that summary judgment for the plaintiffs would be improper because the decision of the court might rest upon facts to be proved in plenary proceedings. Pressed for a definition of such anticipated proof, defendants' counsel was unable to specify, with any reasonable precision, any genuine issue of fact. Moreover, any genuine issue of fact, the resolution of which might control the disposition of the controversy, is required by Rule 5(H)(2)[6] of this court to be disclosed by written statement not later than three days prior to the hearing on a motion for summary judgment. The defendants did not, within the time allowed by this rule, or ever, file the required statement. This corroborates our conclusion that no genuine disputed issue of fact remains. Counsel did orally suggest that the defendants might offer proof that overriding considerations of conservation inspired the adoption of this challenged regulatory scheme. Such proof, whatever it might be, could not alter the result. However worthy or desirable may have been the motives behind the legislation, they cannot cure the obvious constitutional infirmities.

---

[6]This rule, as amended March 1, 1967, reads as follows:

"(2) Any party opposing the motion [for summary judgment] shall, not later than three (3) days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

Accordingly, we deny the defendants' motions to dismiss and for summary judgment. We grant the plaintiffs' motion for summary judgment. The enforcement of the 1969 statute and the regulations in question is permanently enjoined. Plaintiffs' counsel will prepare and submit a proposed form of judgment.[6]

Dated this 26th day of February, 1969.

s/ Walter Ely
United States Circuit Judge

s/ Raymond E. Plummer
United States District Judge

s/ James A. von der Heydt
United States District Judge

Certified to be a true and correct
copy of original filed in my office.

Dated 2-26-69

J. M. Kroninger, Clerk
By s/ J. Meyer, Deputy

[6]Findings of fact and conclusions of law are not required when a disposition is made, such as here, by summary judgment. Fed. R. Civ. P. 52(a). Our opinion recites the essential factual and legal considerations which bear upon the result to which we have been impelled.

United States District Court
for the District of Alaska

No. J-5-68

John Bozanich, et al.,
Plaintiffs,
vs.
Augie Reetz, Commissioner of Fish and Game for the State of Alaska, et al.,
Defendants.

DECREE

This matter having come on for hearing before the undersigned judges duly convened pursuant to 28 USCA §2281, et seq., on February 14, 1969, on defendants' motion to dismiss and motion for summary judgment and the claimants' motions for injunctive relief and for summary judgment, and the plaintiffs appearing through Robert Boochever of Faulkner, Banfield, Boochever & Doogan and Seth W. Morrison of Allen, DeGarmo & Leedy, and the defendants appearing through G. Kent Edwards, Attorney General of the State of Alaska, by Charles Cranston, Assistant Attorney General, and briefs and affidavits having been submitted and the court having heard argument of counsel and having entered its opinion dated February 26, 1969, and good cause having been shown,

It Is Ordered, Adjudged and Decreed as follows:

1. Defendants' motion to dismiss and motion for summary judgment be, and the same are, denied;

2. Plaintiffs' motion for summary judgment be, and the same is, hereby granted;

3. Chapter 186 Session Laws of Alaska, 1968, and Section 102.09 of the 1969 Alaska Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska;

4. Defendants, their successors in office and all persons acting as their agents, officers and servants or under their direction or authority, be, and they are, permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Session Laws of Alaska of 1968, and from denying fishing gear licenses by reason of the authority thereof.

Dated this day of March, 1968.

Walter Ely
United States Circuit Judge

Raymond E. Plummer
United States District Judge

James A. von der Heydt
United States District Judge

Copy received
March 5, 1969
and approved as to form.
s/ Charles L. Cranston
Assistant Attorney General
of Attorneys for Defendants.

Filed February 26, 1969
U.S. District Court
District of Alaska

FILE COPY

[redacted]

Supreme Court of the United States

[redacted]

[redacted]

[redacted]

v.

[redacted]

[redacted]

APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

Faulkner, Banfield, Doogan & Duncan
Roscoe Bonebrake

Room 201, 311 Franklin Street
Juneau, Alaska 99801

Allen, DeGarmo & Lindly
Scott Wardell Mosser, III

1308-1320 Northern Life Tower
Seattle, Washington 98101

Attorneys for Appellees

[redacted]

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1469

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; ROBERT MOSS, Chairman; and MIKE UTTECHT, HARRY A. SHAWBACK, FRANK COOK, DON ELLSWORTH JENSEN and GORDON JENSEN, Members of the Board of Fish and Game for the State of Alaska,

Appellants,

v.

JOHN BOZANICH, ANDY NESS, RUDOLPH PLANCICH, ALAN TAKALO and WILLIAM WHITE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

Appellees pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move that the appellants' appeal be dismissed and/or that the final decree of the District Court in this cause be affirmed on the grounds that the issues posed by appellants are so unsubstantial as not to warrant further argument.

STATEMENT

The defendants, Commissioner of Fish and Game f
the State of Alaska and the Fish and Game Board for th
state, have appealed from the decree,[1] supported by
unanimous opinion,[2] of the three-judge Alaska Distri
Court convened to hear plaintiff fishermen's injuncti
and declaratory relief action in Cause J-5-68. This ca
involves the use and licensing of salmon net fishing gea

The decree, entered March 20, 1969 (record on appe
document No. 52), denied the Commissioner's motion
dismiss and for a summary judgment, and granted th
fishermen's motion for summary judgment, declarin
Chapter 186 of the 1968 Session Laws of the State
Alaska and Section 102.09 of the 1969 Alaska Comme
cial Fishing Regulations unconstitutional under both th
Alaska and the United States Constitution, and enjoinin
the Commissioner *et al.*, from enforcing these provisio

In order to fish commercially for salmon in Alaska, a
applicant must secure a commercial fishing license a
in addition, must fish with licensed gear. The fisherma
holding the gear license must own or lease and personal
operate the gear, usually in conjunction with other co
mercial fishermen crew members (Alaska Statute Se
16.05.480 and 16.05.540 (Appx. p. 23).)

The coastal waters of Alaska are divided into 11 ge
graphical districts described as "salmon registration are
(Appx. p. A-26).

Chapter 186 and the supplemental regulations limit
the right to hold a commercial salmon fishing net ge

1. Appendix page A-1
2. Appendix page A-3

license in any given fishing area to those previously licensed in that area or to those who fished commercially for three years in the area, with additional provisions for so-called hardship and transfer within families. The statute is set forth in full as a footnote to the opinion below (Appx. p. A-4).

The pertinent portions of Chapter 186, SLA 1968 provide:

> "Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who
>
> "(1) has previously held a salmon net gear license for that specific salmon registration area; or
>
> "(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The effect of the statute is to create an exclusive fishing monopoly in the primary commercial fishing method in each registration area for those who qualify by prior participation under the terms of the statute.

The 1969 Alaska fishing regulations were even more restrictive in limiting a salmon net gear license for a specific area to those who either (A) held such a license in that area *in 1965* or subsequent years, or (B) actively engaged in commercial fishing in that area for any three years *since January 1, 1960.* (Appx. p. A-5, 6)

Under this statute and supplemental regulations, the plaintiffs, although experienced commercial fishermen who had held net gear licenses in other Alaska registration areas, were denied licenses in the areas of their

choice. The fishermen sued for injunctive relief and a declaration of unconstitutionality under both the Alaska and United States Constitution. The court below found the statute and regulations unconstitutional under both constitutions. The defendants have appealed, questioning the correctness of the decision based on the federal constitution and arguing that the court should not have considered the state constitutional issue, but they make no argument that the statute and regulations do not violate the state constitutional provisions.

I. The Decision of the Three-Judge District Court Is So Clearly Correct as to Present No Substantial Question for Review by the United States Supreme Court

Prior to the enactment of Chapter 186 of the Session Laws of Alaska, 1968, commercial fishing in Alaska was a common calling open to all fishermen. There were restrictions for conservation purposes on the geographical waters in which fishing was permitted, the times, the type of permissible gear and the fishermen were restricted each year to one of the eleven designated registration areas of their choice.[5] They did, however, have a free choice of areas and could plan their fishing effort accordingly, taking into consideration the annual variations and predicted size and locations of the expected runs of returning salmon.

This basic principle of substantial free choice and flexibility in one of Alaska's major means of livelihood was expressly carried forward into the provisions of the Alaska State Constitution.

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5. Appendix page A-25

Article VIII, Section 3 of the Alaska Constitution provides:

> "*Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Article VIII, Section 15 of the Alaska Constitution provides:

> "*No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

This provision was discussed by the then Attorney General of the State of Alaska in an opinion dated February 9, 1968,[6] which found unconstitutional proposed 1968 regulations essentially similar to the statute and regulations held unconstitutional in the opinion being appealed in this case.

The Attorney General's opinion stated, with reference to the above quoted Section 15:

> "However, perhaps the most pertinent provision of the Alaska Constitution is Article VII, Section 15 which provides:
>
> " 'No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.'
>
> "This provision was derived from Sec. 1 of the White Act of June 6, 1924, 43 Stat. 464, 48 U.S.C.A. Sec. 221 under which Alaska Fisheries were managed prior to statehood.
>
> "The constitutional framers were specific in noting that the phrase was adopted in the Constitution to implement the same goal as that achieved by the Federal statute. The Natural Resources Committee of the Constitutional Convention submitted the fol-

6. Appendix page A-15

lowing commentary on Section 15 to the Convention:

"'Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. [Emphasis added] "Commentary on Article on State Lands and Natural Resources," January 16, 1956, p. 9.'

"In interpreting the scope of the exclusive right of fisheries clause, therefore, it is relevant to examine the interpretation of the clause which existed at the time of the adoption of the State Constitution.

"In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) the U.S. Supreme Court in interpreting the White Act stated:

"'"Exclusive," as used in Section 1 [of the White Act] . . . forbids not only a grant to a single person or corporation but to any special group or number of people. . . . The White Act fishing preserves were not intended to favor a monopoly to a favored few.' (*Supra* at 122)

"In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery. Moreover, we do not believe that the hardship clauses in sections 102.09 and 104.09 save them from the taint of exclusivity since the clauses are far too narrowly limited. This is especially true of the hardship clause of Section 104.09 since its applicability is contingent upon the number of 1967 fishermen who apply for a 1968 license."

The three-judge court below reached the same con-

clusion based on the same constitutional history and the application of the *Hynes v. Grimes Packing Co.* case, 337 U.S. 86 (1949).

Although the Commissioner and Board at pages 19 thru 21 of their Statement as to Jurisdiction contend that the determination of the state constitutional issues by the court below should be subject to appeal to the United States Supreme Court, they *nowhere* suggest or assert in their brief any contention as to wherein the reasoning and conclusion of the decision of the court below and the quoted opinion of the Alaska Attorney General in 1968 are in error in applying the "No Exclusive Right of Fishery" provisions of Section 15.

To support a contention that a "substantial question" exists warranting further argument in the United States Supreme Court, we submit that more is required than the mere assertion that the issue is important. The appellants must not only establish that the issue is important, but must also assert a substantial argument tending to establish error in the decision below. No such argument is made, nor does it otherwise appear that it could be made. The constitutional history of Section 15 and its plain language so clearly prohibit the exclusive right and special privileges granted by Chapter 186 as to put the matter beyond reasonable argument.

If the court below is correct in its application of the Alaska Constitution, then the decree below must be sustained even if the court's application of the Fourteenth Amendment of the United States Constitution might otherwise present a sufficient question to warrant judicial review. Consequently, Question 1 of appellants' State-

ment concerning application of the Fourteenth Amendment is not determinative of the case.

The District Court's application of the "equal protection of the laws" portion of the Fourteenth Amendment to the United States Constitution, and the comparable provisions of the Alaska Constitution under Article I, Section 1 "Inherent Rights," Section 7 "Due Process," and Article VIII "Uniform Application" in sustaining the decree is clearly correct and consistent with the only other cases to consider the issue under closely similar circumstances; *Brown v. Anderson,* 202 F.S. 96 (1962 three-judge D.C. Alaska) in which the court held invalid an Alaska fishing preference act, and *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which the Supreme Court of the State of Washington specifically held that a similar Washington statute restricting fishing rights to prior licensees violated the Fourteenth Amendment of the United States Constitution as well as the comparable provisions of the Washington Constitution.

The appellant/defendants at page 17 of their Statement cite several cases involving the application of the Fourteenth Amendment to state regulatory statutes for the proposition that such application involves substantial federal issues. In each instance of consideration by the United States Supreme Court of the issue of the application of the Fourteenth Amendment cited by appellants, a substantial question of applicability existed *and* the decision of *that* question was determinative of the case. In the present case, it is not.

If the court below had ruled that Chapter 186 did not

violate the Alaska Constitution, but did violate the Fourteenth Amendment, then the review of the latter issue might warrant further consideration by the Supreme Court; or if a substantial question as to the application of the State Constitution could be raised, then this court might feel compelled to review this aspect of the decision under the doctrine of *Louisville and Nashville Railroad Co. v. Garrett*, 231 U.S. 298 (1912), in which the court stated at page 304:

> "The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here."

However, as the decree below is clearly correct under the State Constitution, and no argument is made otherwise by the appellants, there is no basis or necessity for further consideration of other issues by this court.

II. There Is an Actual Controversy Before the Court

At pages 18 and 19 of the Statement, defendants, Commissioner and Board of Fish and Game, assert that no "actual controversy" exists, as required by 62 Stat. 964, 28 U.S.C., §2201 regarding declaratory judgments. It is unquestioned that the plaintiffs were denied net gear licenses in the area of their choice in 1968, and the same statutory and regulatory provisions which excluded plaintiffs in 1968 were in effect and applicable in 1969 at the time this case was submitted.

Appellants make no contention that the licenses would have been granted without the necessity of these proceedings. Their contention apparently is that until there is an actual denial each year of a license, there is no controversy.

The regulations in 1969 were adopted February 12, 1969 (Appx. p. A-5). License applications must be in by April 15 (Appx. p. A-25) for each summer's fishing effort. The timely decision in the present case was only possible because it was commenced in 1968. If appellants' contention as to no controversy were sustained, the plaintiffs as a practical matter could never obtain timely judicial relief.

This same contention was made by the State of Alaska and rejected by the court in the similar situation of preferential fishing rights in *Brown v. Anderson,* 202 F.S. 96 (1962, three-judge D.C. Alaska).

The cases of *Grey v. Saunders,* 372 U.S. 368 (1963); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 156 (1968) and *United States v. Phosphate Export Association,* 393 U.S. 199 (1968), all establish that where the questions are continuing, judicial review cannot be defeated by short term orders, capable of repetition.

The case of *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1947), cited by appellants has not been extended and is entirely dissimilar to the actual, acute controversy in the present case.

Muskrat v. United States, 219 U.S. 346 (1910), involved a situation where there in fact were no conflicting interests between the parties litigant.

It is difficult to conceive of a more actual controversy than in the present case where there is imposed a prohibition of a previously enjoyed means of livelihood. If there

is no substantial question as to the existence of controversy, no further review on this issue appears to be warranted.

III. The Doctrine of Abstention Is Inapplicable and Presents No Substantial Question

At pages 19 thru 21, the appellants contend that the three-judge District Court should have refused to consider the case because the application of a state constitution and statute were involved which had not been but ought first to be interpreted by the state courts, citing *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The doctrine of federal abstention, to the extent it presently exists, is only applicable where the state statute or constitution is so ill defined or uncertain as to be susceptible of an interpretation which would avoid or modify the constitutional issues.

The absence of such uncertainty was recognized in the opinion below in which that court quoted from the case of *Zwickler v. Koota*, 389 U.S. 241 (1967), at page 251, Note 14:

> "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction."

The language of the statute and of the regulation is perfectly clear and unambiguous and is not susceptible to limiting or interpreting construction.

It has earlier been pointed out that appellant defendants have made no assertion as to how the provisions of

the Alaska Constitution, particularly Section 15 (No Exclusive Right of Fishery) could possibly be construed in a manner which would permit the restrictions imposed by Chapter 186.

The opinion of the Alaska Attorney General, which is the closest authority available at the state level, held a comparable limitation could not be sustained and that a limitation on fishing rights to prior licensees granted a prohibited exclusive right of fishery (Appx. p. A-15, A-20).

Jurisdiction existed in the Federal District Court because there was a substantial Federal constitutional question as found by the three-judge court. It also existed in any event before a one-judge court because of diversity of citizenship. All issues were, therefore, properly before the court and the court was obligated to decide them.

The court below observed:

> "Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable."

There are no "special circumstances" to sustain the doctrine of abstention as required by *Propper v. Clark*, 337 U.S. 472 at 492 (1948).

No case has held that merely because a state statute or constitution is involved, a federal court cannot pass upon these issues. In fact, the leading cases on the issue expressly hold to the contrary—once the federal court has jurisdiction, it may and should decide state as well

as Federal issues. *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1959); *Louisville and Nashville Railroad Co. v. Garrett*, 231 U.S. 298 (1912); *Michigan Central Railroad v. Powers*, 201 U.S. 245 (1906); *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963).

IV. The District Court Properly Granted Plaintiffs' Motion for Summary Judgment

In plaintiffs' amended complaint at paragraph 9, page 6, it is alleged:

> "The provisions of Chapter 186 of the Laws of Alaska, 1968, . . . are also . . . in contravention of the aforequoted provisions of the Alaska Constitution, to wit, Article I, Sections 1 and 7, and Article VIII, Sections 3, 15, and 17 and of Article I, Section 8, Clause 3 and the Fourteenth Amendment, Section 1 of the United States Constitution in that a right to fishing gear licenses would be denied some applicants equally entitled thereto under the existing law, and an absolute monopoly of gear licenses is granted to those previously licensed in the same area, or who have fished commercially in that area for someone else for three years. A special and exclusive right of fishery is thereby granted on the sole basis of prior entitlement or employment by someone else who has prior entitlement."

In plaintiffs' brief supporting its motion for summary judgment, dated January 18, 1969 at page 8, the argument was advanced:

> "Contrary to the defendants' assertion in some of their argument that anyone can obtain a gear license within three years by commercial fishing during that period, it should be pointed out that the possibility

> of obtaining such a gear license is wholly dependent upon obtaining employment with some fisherman who holds a gear license during the three years involved. If the gear licensees elected to limit employment opportunities to their own families, friends or townsfolk, the employment opportunity could become very scarce. This is particularly true in the Bristol Bay Area where there is only one crewman working with each gear licensee. This factor will become even more critical as the value of the restrictive gear license makes it economically desirable for the licensees to limit the opportunity to others to obtain such a license."

A hearing was held on the motion for summary judgment on February 14, 1969 and in oral argument for the first time, defendants contended that there might be some issue of fact as to whether "under this scheme entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and choose among the commercial fishermen, if any, that they might wish to hire." (P. 22, Appellants' Statement quoting from Opinion of Court, App. VII of that Statement.)

From the provisions of the law and regulations, such control over entry into the salmon fishing industry is abundantly clear. As has been indicated previously, there are two requirements before one may fish for salmon commercially in Alaska, to-wit:

1. an individual commercial fishing license; and
2. a commercial fishing gear license.

A person holding an individual commercial fishing license may only fish with licensed gear. 5 A.A.C. 39.120 (b)(1) of the general provisions of the Alaska Commercial Fishing Regulations of 1969 specifies:

> "No person may operate a net and vessel used to take salmon with such net unless the net and vessel are properly licensed . . . for the registration area selected . . ."

Section 16.05.540 Alaska Statutes specifies:

> "The fishing gear licenses . . . shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear."

Since a commercial fisherman is only able to fish by net in the area of his choice if he holds a fishing net gear license or fishes with someone else who has a net gear license, it is obvious that such a person may not acquire three years of fishing experience with net gear in the area unless he can persuade someone who has such a license to permit him to fish on the crew with that person.

> "Under Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, if all of the basic facts are undisputed and the matter is one of interpretation or the reaching of a conclusion by the court, the court may grant a motion for Summary Judgment."

Keele v. Union Pac. R. Co., 78 F.S. 678, 679 (D.C.S.D. Calif. 1948).

Even if it could be contended that there is some issue of fact pertaining to the control by the gear licensees of the entry into the commercial fishing industry under the law and regulations found by the United States District Court to be invalid, plaintiffs may not raise such an alleged issue of fact at this time. Rule 5 H(2) of the General and Criminal Rules United States District Court for the District of Alaska, effective June 1, 1964 as

amended March 1, 1967 specifies with reference to a motion for summary judgment:

> "(2) Any party opposing the motion shall, not later than three (3) days prior to the hearing, serve and file a *concise 'statement of genuine issues'* setting forth all material facts as to which it is contended there exists *a genuine issue necessary to be litigated.*" (Emphasis supplied)

Plaintiffs never filed any "statement of genuine issues" and until oral argument, based their position entirely on the legal consequences of the laws and regulations here involved. It is not permissible for such issues to be raised now before the United States Supreme Court.

CONCLUSION

Appellants have invoked several procedural issues as a basis for further consideration of appeal in this court, but they have failed to demonstrate any prejudice or adverse result from such issues. Unless the issues have a vital and significant bearing on the case, they are not of such significance as to warrant further consideration.

The decision below is clearly sustained by at least one of the grounds discussed in the three-judge opinion, and no issue of sufficient substance or controversy requiring a different result in the case has been submitted by appellants. We therefore urge that the appeal be dismissed or the decree affirmed.

DATED this 2nd of July, 1969.

Respectfully submitted,

FAULKNER, BANFIELD,
BOOCHEVER & DOOGAN
ROBERT BOOCHEVER

ALLEN, DEGARMO & LEEDY
SETH WARNER MORRISON, III
Attorneys for Appellees

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

JOHN BOZANICH, *et al.*, *Plaintiffs*,

v.

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska, *et al.*, *Defendants.*

No. J-5-68

DECREE

This matter having come on for hearing before the undersigned judges duly convened pursuant to 28 U.S.C.A. §2281, *et seq.*, on February 14, 1969, on defendants' motion to dismiss and motion for summary judgment and the claimants' motions for injunctive relief and for summary judgment, and the plaintiffs appearing through Robert Boochever of Faulkner, Banfield, Boochever & Doogan and Seth W. Morrison of Allen, DeGarmo & Leedy, and the defendants appearing through G. Kent Edwards, Attorney General of the State of Alaska, by Charles Cranston, Assistant Attorney General, and briefs and affidavits having been submitted and the court having heard argument of counsel and having entered its opinion dated February 26, 1969, and good cause having been shown,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' motion to dismiss and motion for summary judgment be, and the same are, denied;

2. Plaintiffs' motion for summary judgment be, and the same is, hereby granted;

3. Chapter 186 Session Laws of Alaska, 1968, and Section 102.09 of the 1969 Alaska Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska;

4. Defendants, their successors in office and all persons acting as their agents, officers and servants or under their direction or authority, be, and they are, permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Session Laws of Alaska of 1968, and from denying fishing gear licenses by reason of the authority thereof.

DATED this 20th day of March, 1968.

.....
WALTER ELY
United States Circuit Judge

.....
RAYMOND E. PLUMMER
United States District Judge

.....
JAMES A. VON DER HEYDT
United States District Judge

Copy received
March ....., 1969
and approved as to form.

.....
Assistant Attorney General
of Attorneys for Defendants

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

JOHN BOZANICH, *et al.*,
Plaintiffs,

v.

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska, *et al.*,
Defendants.

No. J-5-68
OPINION

Endorsed. FILED Feb. 26, 1969
United States District Court of Alaska

By....., Deputy

Before: WALTER ELY, Circuit Judge, and
RAYMOND E. PLUMMER and
JAMES A. VON DER HEYDT, District Judges

ELY, Circuit Judge:

Plaintiffs are nonresidents of Alaska. The defendants are those authorities of the State of Alaska charged with the enforcement of Alaska regulations pertaining to fishing rights. The plaintiffs are experienced salmon fishermen, and each has pursued his occupation in certain, although not all, of the coastal waters of Alaska. Those waters are generally divided into twelve fishing regions. In 1968, Alaska adopted a certain statute under which fishing rights in the different regions were thereafter to be regulated by gear licensing requirements.[1] The word

1. Attached as footnote 1 is chapter 186, S.L.A. 1968.
We set forth here the pertinent statute, chapter 186, S.L.A. 1968.

AN ACT

Relating to persons eligible to obtain gear licenses, and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

*Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. PERSONS ELIGIBLE FOR GEAR LICENSES. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required required by (b)(1) and (2) of this section is guilty of a misdemeanor.

*Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. LIMITATION ON ISSUANCE OF FISHING GEAR LICENSES. The fishing gear licenses mentioned in secs. 530-

"gear," in its pertinent meaning here, refers to the operating nets employed in the commercial harvesting of salmon. The statute undertook to confer upon the Board of Fish and Game the right to adopt additional regulations pursuant to the statute. The most recent of the regulations, those which are pertinent here, became effective on February 12, 1969.[2] From an examination of the germane provisions of the statute, quoted in the margin, it is apparent that none of the plaintiffs could qualify for a salmon net gear license to fish in some of the twelve regions. In fact, their applications for the 1968 fishing season were denied under regulations less restrictive than those most recently issued.

The plaintiffs have argued that the licensing requirements are invalid as violative of both the Constitution of the United States and the State of Alaska. There is no

650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

*Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

*Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968

Actual effective date: January 1, 1969

2. We quote here the relevant extract from the 1969 Commercial Fishing Regulations for the State of Alaska:

"Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon

jurisdictional problem with the amount in controversy, and in light of the substantial federal question, our jurisdiction is initially founded on 28 U.S.C. §1331(a). Since plaintiffs seek a declaration of the unconstitutionality of state laws and an injunction against their enforcement, our three-judge District Court was convened pursuant to 28 U.S.C. §§2281, 2284. On February 14, 1969, we conducted a hearing on the defendants' motion to dismiss and motion for summary judgment and the plaintiffs' motions for injunctive relief and for summary judgment. We took the cause under advisement, and our review of the authorities has convinced us that we must deny the defendants' motions and enter summary judgment in favor of the plaintiffs. Our reasons follow.

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registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;

If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource."

In their motion to dismiss, the defendants suggested that there is no case or controversy because the issues are moot. This contention is valid in its application to the plaintiffs' original complaint, which challenged the now-expired 1968 regulations under which they were denied licenses for that season. The plaintiffs' amended complaint, however, deals squarely with the 1969 regulations and statute now in effect and under which they would clearly be prevented from obtaining the gear licenses necessary for utilizing thir salmon-catching equipment in certain coastal regions that they desire. Another three-judge court of this District overruled a similar suggestion of mootness and explained its reasoning at length in *Brown v. Anderson*, 202 F. Supp. 96 (D. Alaska, 1962).

The defendants also urge that we abstain from consideration of the issues in light of the questions of state law involved in the case. It is perfectly clear to us that the plaintiffs should not be penalized by our adopting the position that we should abstain from meeting the important constitutional issues presented until the Alaska state courts may at some future time be called upon to analyze the questions. Our abstention would surely deprive the plaintiffs of substantial engagement in their occupation during this year's forthcoming fishing season. This prospective injury to their economic livelihood looms too grave and irreparable to permit delay in the adjudication of their constitutional rights. Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged

gear licensing scheme is not supportable. See the analysis of authorities in *Zwickler v. Koota*, 389 U.S. 241, 250-51, 88 S. Ct. 391, 19 L.ed.2d 444 (1967). In *Zwickler*, the Supreme Court stated, "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." [Citations omitted.] 389 U.S. at 251, note 14.

As we interpret the licensing scheme, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The only persons that can presently qualify for net-gear licenses are those already vested with the local privilege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960.[3] An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net-gear to catch salmon. Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interests of conservation and safe-

3. Commercial Fishing Regulations, section 102.09(a)(1)(A), (B) (1969), note 2, *supra*. No other entries into the salmon fishing industry in any coastal region are permitted except the narrowly prescribed class of extreme hardship cases as limited in section 102.09(a)(2)(1969), also quoted in note 2, *supra*. Under this "hardship" provision, a licensee would be empowered to assign his license to anyone, regardless of whether or not the assignee had any fishing experience whatsoever.

ty, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud*,[4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

> "In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at

4. 354 U.S. 457, 77 S. Ct. 1344, 1 L.ed.2d 1485 (1957).

> the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.
>
> "To these rules we add the caution that 'Discriminations of an unsual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" (Citations omitted)

354 U.S. at 463-64, citing other controlling authorities; see *Mayhue v. City of Plantation*, 375 F.2d 447, 450-51 (5th Cir., 1967); *cf. Levy v. Louisiana*, 391 U.S. 68, 71, 88. S. Ct. 1509, 20 L.ed.2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless, we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary "prior experience" in the industry in the hands of private citizens now eligible for the required licenses. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the "experience" necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life.

Although we would have preferred that the Alaska courts should have had the first opportunity to so hold, we must also now declare that the licensing scheme violates the Alaska Constitution, which, in its Article VIII, provides:

> "Section 3. *Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The Attorney General of Alaska, in an Opinion directed to the Commissioner of the Department of Fish and Game, dated February 9, 1968, emphasized the unconstitutionality of a proposed and essentially similar licensing requirement which would have restricted area licenses to those license-holders within the same area in the past two years. The Attorney General relied on *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which 1933 salmon gear licenses were issued only to those who had held licenses in 1931 or 1932. He set forth the legislative history of section 15, *supra,* demonstrating that the provision was based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska fisheries were regulated prior to Alaska's statehood. The leading case considering the White Act is *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 69 S. Ct. 968, 93 L.ed. 1231 (1949). The Secretary of the Interior had ordered certain Alaska waters closed to fishing by all except those of the Karluk Indian Reservation and their licensees. The Supreme Court in *Hynes* held that the White Act prohibited fishing grants

to special groups or numbers of people. We read, at 120-22:

> "Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves. . . .
>
> "For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted. . . . [W]e are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character. . . .
>
> "We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights.'

The Attorney General of Alaska also ruled that the Board of Fish and Game could not be given the delegated authority in the absence of guiding standards prescribed by other provisions of law, to specify certain prior years as the test for whether salmon gear licenses would be issued. Hear, the Board has set specific years in the 1960s, although no guidelines are included in the 1969 statutory scheme. In this connection, it is pertinent to note that the Attorney General's Opinion was explicitly made applicable to section 102.09, the forerunner of the section 102.09 regulations set out in footnote 2, *supra*.

The Alaska Legislature apparently attempted to avoid the impact of Attorney General Boyko's Opinion by ostensibly providing an avenue by which a commercial licensee might, after three years with such an area license, obtain a salmon gear license in the particular area. The fact that he might do so, even though he could never, without the

aid of an established net-gear licensee, have previously gained experience in the area with gear essential to commercial salmon fishing does not harmonize with the defendants' argument that the challenged scheme is designed to promote safe operations by experienced fishermen. It appears to us that the "escape" avenue offers nothing beyond an illusory hope to non-established salmon fishermen seeking to ply their trade in a new area.

There is no saving difference between the present licensing scheme and that to which the Atorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable by the framers of Alaska's Constitution. As a properly constituted three-judge court, we have jurisdiction to consider all legal attacks upon the statute. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80-81, 80 S. Ct. 568, 4 L.ed.2d 568 (1960). We therefore conclude that the 1969 salmon net-gear licensing statute and its consequent regulations cannot survive the requirements of the equal protection clause of the Constitution of the United States or those of the Constitution of Alaska.

In oral argument the defendants argued that summary judgment for the plaintiffs would be improper because the decision of the court might rest upon facts to be proved in plenary proceedings. Pressed for a definition of such anticipated proof, defendants' counsel was unable to specify, with any reasonable precision, any genuine issue of fact. Moreover, any genuine issue of fact, the resolution of which might control the disposition of the controversy,

is required by Rule 5(H)(2)[5] of this court to be disclosed by written statement not later than three days prior to the hearing on a motion for summary judgment. The defendants did not, within the time allowed by this rule, or ever, file the required statement. This corroborates our conclusion that no genuine disputed issue of fact remains. Counsel did orally suggest that the defendants might offer proof that overriding considerations of conservation inspired the adoption of this challenged regulatory scheme. Such proof, whatever it might be, could not alter the result. However worthy or desirable may have been the motives behind the legislation, they cannot cure the obvious constitutional infirmities.

Accordingly, we deny the defendants' motions to dismiss and for summary judgment. We grant the plaintiffs' motion for summary judgment. The enforcement of the 1969 statute and the regulations in question is permanently enjoined. Plaintiffs' counsel will prepare and submit a proposed form of judgment.[6]

Dated this 26th day of February, 1969.

s/WALTER ELY
United States Circuit Judge
s/RAYMOND E. PLUMMER
United States District Judge
s/JAMES A. VON DER HEYDT
United States District Judge

[Certification]

5. This rule, as amended March 1, 1967, reads as follows:
"(2) Any party opposing the motion [for summary judgment] shall, not later than three (3) days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

6. Findings of fact and conclusions of law are not required when a disposition is made, such as here, by summary judgment. Fed. R. Civ. P. 52(a). Our opinion recites the essential factual and legal considerations which bear upon the result to which we have been impelled.

APPENDIX C

STATE OF ALASKA

Walter J. Hickel, Governor

Department of Law
Office of the Attorney General
Pouch K, State Capitol—Juneau 99801

February 9, 1968

Honorable Urban C. Nelson, Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: 1968 Commercial Fishing Regulation
Section 102.09 and 104.09

Dear Commissioner Nelson:

We have most carefully and conscientiously examined and reexamined Sections 102.09 and 104.09 of the proposed 1968 Commercial Fishing Regulations in a sincere effort to find a sound legal basis on which to support their validity. We made this special effort because we were mindful of the many days and hours expended by the Board of Fish and Game and by your Department in hearings, deliberations, consultations, and research as well as preparation and drafting for the purpose of arriving at a set of salmon fishery gear limitations which would be sufficient to cope with the tremendous problems involved in protecting the species and avoiding the disastrous economic cycles, particularly in the Bristol Bay area, which recurringly threaten the industry.

We are most hesitant to invalidate the product of so

much hard, conscientious and sincere labor of so many devoted public servants. Nevertheless, we are charged by law with the duty of examining these regulations for their legal validity and moreover will be called upon to defend them against attack in the courts which may be confidently expected to materialize in the fact of such significant exercise of the state police power.

We have reluctantly come to the conclusion that we cannot sustain the validity of these regulations as presently proposed for the following reasons:

1. With respect to Section 104.09, governing Salmon Registration Area T, we do not believe that the point-credit system for 1968 or its continuation for years subsequent to 1968, as set forth in subsections (a) and (b) of the cited section, can be sustained because, instead of being based upon a broad historical period and all available statistical records, it arbitrarily selects the 1967 season as the only qualifying test. Moreover, we feel that elimination of all other pertinent tests of qualification and concentration of prior registration during the 1967 Bristol Bay fishing season is so narrow as to invite a finding that it is arbitrary because it is lacking in reasonable classification and because there is no rational connection between the biological, social and economic factors underlying the Bristol Bay fisheries emergency and the remedy adopted by the regulation.

In fact, Section 102.09 suffers from the same type of deficiency since only those who obtained year licenses in 1966 or 1968 are allowed to fish in the remaining salmon registration areas of the state.

A statute containing provisions similar to Section 102.09

of the proposed regulations was challenged in the case of *State ex rel. Bacich v. Huse*, 59 P.2d 1101 (Wash., 1936). The statute permitted only those persons who had held salmon gill net licenses in 1931 or 1932 to purchase salmon gill net licenses in 1933. No provision for new entrants was embodied in the statute.

The Washington Supreme Court held that the statute violated the Fourteenth Amendment of the United States Constitution for two reasons. 1) it set up a special privilege in a few people without justifiable reason for the selection of the privileged few (discussed more fully below), and 2) the choice of the base years was "not predicated on any fair, just ar natural basis of selection, but [was] wholly arbitrary and capricious." The court stated:

> The classification made by section 4 of the [Washington] act in question can have no natural, reasonable or just relation to the subject matter of the act. If conservation be the end sought, it is not promoted by selecting a particular class of persons on an arbitrary basis and conferring special privileges on them and denying the same privileges to others. Concededly, regulations might be prescribed which would tend to accomplish the desired result. But such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state. The selection rests upon mere accidnt or circumstance, and not upon conditions effecting a natural line of cleavage. We are of the opinion, and hold, that section 4 of the act . . . is unconstitutional and void. (*Supra* at 1105)

In another case, *Rabin v. Connor*, 174 So.2d 721 (Fla.

1965), a serious economic problem in the celery industry of Florida had prompted the legislature to conduct an extensive study of the industry. As a result of the legislative findings an act was passed and regulations were promulgated which made the amount a celery producer could sell dependent upon the amount he had sold in two past celery seasons. Provision was even made for issuance of a very small number of temporary certificates to producers who had not grown celery in the two designated seasons.

The Supreme Court of Florida held that the statute and regulations violated the Fourteenth Amendment to the U.S. Constitution. The Court said:

> In determining the validity of legislation and orders of the kind involved here, the vital factor to be considered is the practical effect and impact thereof . . . The practical effect of this marketing order is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny others the right to participate at all.
>
> . . . It is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and denial of equal protection of the law. . . . (*Supra* at 725)

2. We believe that Sections 102.09 and 104.09 are also invalid because they do not provide for the licensing of new entrants, who must be admitted under any rational system of gear limitation in order to meet constitutional requirements. The United States Constitutional requirements in this regard were discussed above in connection

with the *Huse* and *Rubin* cases and will not be further expounded upon here. However, there are two Alaska constitutional provisions (in addition to the provisions which parallel the U.S. Constitution) which are also violated by these regulations.

Article 1, Section 15 of the Alaska Constitution provides in pertinent part:

> . . . No law making any irrevocable grant of special privileges or immunities shall be passed . . .

Similar provisions in other state constitutions have been held to mean that a state may not grant an exclusive right to fish to a person or a specific group of persons. 36A C.J.S. Fish Section 36, page 562. *State ex rel. State Game Commission v. Red River Val. Co.*, 182 P.2d 421 (N.M., 1946).

However, perhaps the most pertinent provision of the Alaska Constitution is Article VIII Section 15 which provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

This provision was derived from Sec. 1 of the White Act of June 6, 1924, 43 Stat. 464, 48 U.S.C.A. Sec. 221 under which Alaska Fisheries were managed prior to statehood.

The constitutional framers were specific in noting that the phrase was adopted in the Constitution to implement the same goal as that achieved by the Federal statute. The Natural Resources Committee of the Constitutional Convention submitted the following commentary on Section 15 to the Convention:

> Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the pro-

> vision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. (Emphasis added.) "Commentary on Article on State Lands and Natural Resources," January 16, 1956, p. 9.

In interpreting the scope of the exclusive right of fisheries clause, therefore, it is relevant to examine the interpretation of the clause which existed at the time of the adoption of the State Constitution.

In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the U.S. Supreme Court in interpreting the White Act stated:

> "Exclusive," as used in Section 1 (of the White Act) . . . forbids not only a grant to a single person or corporation but to any special group or number of people. . . . The White Act fishing preserves were not intended to favor a monopoly to a favored few. (*Supra* at 122)

In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery. Moreover, we do not believe that the hardship clauses in Sections 102.09 and 104.09 save them from the taint of exclusivity since the clauses are far too narrowly limited. This is especially true of the hardship clause of Section 104.09 since its applicability is contingent upon the number of 1967 fishermen who apply for a 1968 license.

3. In addition the general moratorium applicable to salmon fishery in all areas of the state (Section 102.09)

cannot be sustained in view of the fact that the specific limitations imposed upon the issuance of salmon gear licenses in the Bristol Bay disaster area have been pegged to the highest number historically issued in that area. Had there been a drastic reduction in the total number of licenses to be authorized from that experienced in the past year or two, it could have been successfully argued that an overall moratorium was necessary to avoid a mass exodus of salmon fishermen from the Bristol Bay area, resulting in an overflow into other fishing areas of the State. In the absence of such economic and historical justification, we believe that Section 102.09 would be struck down as being in excess of the police power of the State and in violation of equal protection and due process clauses of the Federal and State Constitutions.

4. Finally it is our opinion that the authority delegated the Board under A.S. 16.05.250 does not include the power to establish age limitations of the type contained in Section 104.09. As stated an A.S. 44.62.020:

> . . . to be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

Let me again reiterate and stress the great reluctance with which we have reached the foregoing conclusion. We feel however, that to ignore our serious legal doubts and to permit these regulations to take effect only to find them immediately attacked in the courts and then perhaps set aside right at the beginning of the fishing season, would do a great disservice to all concerned.

We regret the delay in transmitting these observations and recommendations, which was occasioned by our great

desire to explore every possible avenue which would avoid questioning the validity of these carefully considered regulations. We continue to stand ready to work with your department and with the Board in a continued effort to promulgate regulations or to recommend legislation which would solve these great problems within the legal framework of our Federal and State Constitutions and laws.

Sincerely yours,
EDGAR PAUL BOYKO
Attorney General

EPB:mmm

cc Honorable Walter J. Hickel
Governor of Alaska
Chairman of the Board of Fish & Game
Members of the Board of Fish & Game
Secretary of State

APPENDIX D

ADDITIONAL SELECTED ALASKA COMMERCIAL FISHING STATUTES AND REGULATIONS

Alaska Statutes

Sec. 16.05.480. *Commercial Fishing License.* (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $10 for residents, and $30 for non-residents. All commercial fishing licenses are nontransferable and shall be retained in the possession of the licensee, readily accessible for inspection at all times.

Sec. 16.05.540. *Limitation on issuance of fishing gear licenses.* The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

Sec. 16.05.670. *Fishing gear license in general.* (a) A fishing gear license issued under secs. 550, 560, and 590-650 of this chapter may be transferred only if sickness, injury, death, unavailability or other incapacitation of the licensee keep or may keep a commercial fishing vessel in port because of the lack of other licensed fishing gear to take its place. A fishing gear license issued under secs. 570 and 580 of this chapter may be transferred only if sickness, injury, or death of the licensee keep or may keep a commercial fishing vessel in port because of the lack of other

licensed fishing gear to take its place. . . . (e) It is unlawful for gear which is licensed as provided in this chapter to be operated or caused to be operated by a person other than the licensee or the person to whom the license was transferred upon notice to the department.

Alaska Administrative Code

5 AAC 39.110. COMMERCIAL FISHING LICENSES AND REGISTRATION.

(a) All commercial fishermen shall have their commercial fishing licenses before fishing in any waters of Alaska.

(b) Not more than one commercial fishing license may be obtained by a person during any one calendar year.

(c) The following provisions apply to salmon net fishermen:

(1) Each salmon net fisherman shall be properly licensed, and registered in the registration area of the fisherman's choice as set out in sec. 120(d)(1) of this chapter.

(2 The license shall be valid for salmon net fishing only in the area that appears on the license.

(3) Upon request, the commissioner shall permit the license to be transferred to another registration area if the fisherman does not hold a salmon net gear license in either area and such transfer will not jeopardize proper conservation.

5 AAC 39.120. LICENSES AND REGISTRATION OF FISHING VESSELS AND GEAR.

(a) No person may operate a vessel and gear to take fish in an area of intended operation unless the vessel and gear have been registered with the local representative of the department. Registration, with the exception of salmon net and king crab fishing, may be done any time to commencing fishing. This does not apply to halibut fishing.

(b) Salmon fishing net and vessel license and registration requirements are as follows:

(1) No person may operate a net, and vessel used to take salmon with such net, unless the net and vessel are properly licensed and registered not later than April 15 of the year of operation for the registration area selected, except in the Arctic-Yukon-Kuskokwim area where the registration date shall be June 1 for the Yukon district. In the remainder of the Arctic-Yukon-Kuskokwim area, registration shall be at any time before commercial fishing.

(2) Registered nets and vessels shall be used to take salmon only in the one area for which they are registered.

(3) The late registration, or the transfer of registered nets or vessels to another registration area shall be permitted by the commissioner only in the case of serious injury, sickness or death, or loss of vessel by sinking,

destruction or extensive mechanical breakdown.

. . . .

(d) Each registration area shall be assigned a code letter. The registration areas are described as follows:

(1) Salmon registration areas are:

Code Letter	Area
A —	Southeastern Alaska area
D —	Yakutat area
E —	Prince William Sound area, Copper River-Bering River area and the Yakataga district of the Yakutat area
K —	Kodiak area
L —	Chignik area
M —	Alaska Peninsula area and Aleutian Islands area
T —	Bristol Bay area, and after August 1 and before June 15, the Cinder River, Port Heiden and Ilnik sections of the Northern district of the Alaska Peninsula area
W —	Kuskokwim district of the Arctic-Yukon-Kuskokwim area
X —	Kotzebue district of the Arctic-Yukon-Kuskokwim area
Y —	Yukon district of the Arctic-Yukon-Kuskokwim area
Z —	Norton Sound district of the Arctic-Yukon-Kuskokwim area.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1469

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; ROBERT MOSS, Chairman; and MIKE UTTECHT, HARRY A. SHAWBACK, FRANK COOK, DON HARRIS, DON SMITH, GLENN DESPAIN, J. ELLSWORTH JENSEN and GORDON JENSEN, Members of the Board of Fish and Game for the State of Alaska,

Appellants,

vs.

JOHN BOZANICH, ANDY NESS, RUDOLPH PLANCICH, ALAN TAKALO and WILLIAM WHITE,

Appellees.

Appeal from the United States District Court for the District of Alaska

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

ARGUMENT

Appellees assert that the decision of the three judge district court that the Alaska statutory and regula-

tory provisions violated Article VIII Section 15 of the Alaska Constitution is so clearly correct as to present no substantial question for review by the United States Supreme Court. This assertion by appellees is incorrect.

Article VIII Section 15 of the Alaska Constitution provides:

> NO EXCLUSIVE RIGHT OF FISHERY. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Appellants, on page 22 of their jurisdictional statement, pointed out that in granting summary judgment the court based its decision largely upon a fact not in evidence before it. The court stated:

> Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they may wish to hire. [Appendix to Jurisdictional Statement, page vii].

The court also stated in its opinion:

> Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. [Appendix to Jurisdictional Statement, page vii].

There was no evidence properly before the court upon which the court could reach that conclusion. The

court thereby interpreted the effect of the statute under attack, AS 16.05.536, upon facts not in evidence. The clear, unambiguous wording of the relevant portions of the statute that a salmon net gear license may be issued to a person who "(2) has, for any three years, held a commercial fishing license and while so licensed actually engaged in commercial fishing in that specific area" does not compel the conclusion reached by the lower court. Thus, the conclusion of that court that the statute creates an exclusive right of fishery in violation of Article VIII Section 15 of the Alaska Constitution is clearly erroneous. The basis upon which the court reached its conclusion is not in accordance with F.R.C.P. 56 (e).

In support of the position that the court correctly ruled in respect to their motion for summary judgment appellees cite a letter from then Attorney General, Edgar Paul Boyko, to the Commissioner of Fish and Game (Appendix C, Appellees' Motion to Dismiss and/or Affirm). The conclusion of that letter is that the regulations then under consideration were unconstitutional. Appellees assert that the letter—

> [F]ound unconstitutional proposed 1968 regulations held unconstitutional in the opinion being appealed in this case. [Appellees' Brief, page 5].

That broad statement is highly inaccurate. The letter was directed to proposed regulations of the Alaska Department of Fish and Game which never became final. Moreover, subparagraph 2 of the letter (page A-18 Appendix to Appellees' Brief) states:

> We believe that Section 102.09 and 104.09 are also invalid because they do not provide for the licensing of new entrants, who must be admitted under any rational system of gear limitation in order to meet constitutional requirements.

On the basis of this letter, changes were incorporated in Section 102.09 of the 1968 Alaska Commercial Fishing Regulations. The changes provided a system of new entry. Based upon the changes, the Attorney General of the State of Alaska, in a letter dated February 16, 1968, attached hereto in Appendix A, approved Section 102.09 of the 1968 Commercial Fishing Regulations.

The clear effect of the statutory and regulatory provisions is to permit orderly new entry into the Alaska Salmon Net Gear Fishery. In the light of such new entry, there is no exclusive right of fishery in violation of Article VIII Section 15 of the Alaska Constitution. The decision of the three judge district court is not, therefore, clearly correct. Substantial questions in respect to the regulatory and statutory provisions in the light of the Alaska Constitutional provisions are presented for review by this court.

Appellees rely on the case of *Brown v. Anderson,* 202 F.Supp. 96 (D. Alaska 1962) to support their assertion that there is an actual case in controversy between the parties. It is only necessary to note that the decision of the three judge court in that case has never been reviewed by an appellate court. The case simply indicates that courts are prone to repeat their error. The lower court decision in *Brown v. Ander-*

son, supra, is no more binding on the Supreme Court than is the court's decision in the case at bar. On the basis of the facts involved in this case, there is a substantial question as to whether there is an actual case in controversy.

That the application of the doctrine of abstention to this case raises substantial issues for this court is made clear by this court's statement in *Railroad Comm'n. of Texas v. Pullman Co.,* 312 U.S. 496 (1941). One assertion in that case was that a state regulation violated state law. The United States Supreme Court ordered the Federal court to retain jurisdiction pending the determination of issues involving state law by the state court. The Supreme Court stated:

> The lower [federal district] court did deny that the Texas statutes sustained the commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by state adjudication. The

> reign of law is hardly promoted if an unnecessary ruling of federal court is thus supplanted by a controlling decision of a state court. . . .
>
> . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, . . . or the final authority of a state court to interpret doubtful regulatory laws of the state. (312 U.S. at pages 500-501).

The same comments would apply to the case at bar.

CONCLUSION

On the basis of the foregoing it is clear that the issues raised by this appeal are substantial notwithstanding appellees' assertion to the contrary. The appellants therefore urge that this court assume jurisdiction of this appeal in order that the important issues may be briefed on the merits.

Dated, July 17, 1969.

G. KENT EDWARDS,
Attorney General, State of Alaska,
By ROBERT L. HARTIG,
Assistant Attorney General,
Attorneys for Appellants.

(Appendix A Follows)

Appendix A

February 16, 1968

The Honorable August F. Reetz
Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: Proposed Section 102.09 of the
1968 Commercial Fishing
Regulations

Dear Commission Reetz:

Pursuant to AS 44.62.060 our office has reviewed the above referenced regulation and have concluded that it is legally valid, clear in content and proper in form.

By copy of this letter we are also advising the Secretary of State of our belief that the notice of publication requirements of the Administrative Procedure Act have been complied with in promulgating said regulation even though the regulation was a product of two separate Board meetings, only one of which was designated in the public notice regarding said regulation.

Sincerely,
Edgar Paul Boyko
Attorney General
By G. Kent Edwards
Deputy Attorney General

EPK:GKE:rw
cc: Secretary of State

ERRATA

(a) Page 42, fourth line from bottom:
The word "arbitration" should be "abstention".

(b) Page 43, 12th line from the top:
The word "has" should be "have".

(c) Page 50, third line from bottom:
The word "urge" should be "urged".

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Section 2284 2

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 185

AUGIE REETZ, Commissioner of Fish and Game for Alaska, et al.,
Appellants,

vs.

JOHN BOZANICH, et al.,
Appellees.

Appeal from the United States District Court for the District of Alaska

BRIEF OF APPELLANTS

OFFICIAL AND UNOFFICIAL REPORT OF OPINION DELIVERED IN UNITED STATES DISTRICT COURT

Bozanich v. Reetz, 297 F. Supp. 300 (1969)

JURISDICTION

The appeal herein is from a final decree made and entered on March 20, 1969, by the United States Dis-

trict Court for the District of Alaska, specially constituted as a District Court of three judges pursuant to the provisions of 28 USC, Sec. 2284. The final decree appealed from declared as unconstitutional Chapter 186, Session Laws of Alaska, 1968, also known as Sections 16.05.536, 16.05.540 and 16.05.250 of the Alaska Statutes, as amended by Ch. 186, Laws of Alaska 1968. The decree also declared unconstitutional Section 102.09 of the proposed 1969 Alaska Commercial Fishing Regulations and enjoined the named state officials from enforcing those regulations and the statute.

The Supreme Court has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 USC, Sections 1253 and 2101(a).

The final decree appealed from was made and entered on March 20, 1968. Notice of appeal was filed in the United States District Court for the District of Alaska on April 3, 1969, within the thirty days required by 28 USC, Section 2101(a). The record was made up and the case filed with the Clerk of the United States Supreme Court on May 31, 1969, within sixty days after the appeal as required by 28 USC, Section 2101(a).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES

Constitutional Provisions

United States Constitution

Sec. 1, Article XIV, amendments:

"... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

Alaska Constitution

Sec. 3, Article VIII:

"Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Section 15, Article VIII:

"No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

Statutes

Chapter 186, *Session Laws of Alaska*, 1968:

Be It Enacted By The Legislature of The State of Alaska:

*Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that excessive entry into Alaska fishing area has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending

toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

*Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. PERSONS ELIGIBLE FOR GEAR LICENSES. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

*Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. LIMITATION ON ISSUANCE OF FISHING GEAR LICENSES. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

*Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

*Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of

the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Regulations

Proposed 1969 Commercial Fishing Regulations for State of Alaska, Sec. 102.09:

"Section 102.09. Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death; If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource.

Rules

Federal Rules of Civil Procedure—Rule 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mat-

ter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

QUESTIONS PRESENTED FOR REVIEW

1. Does Ch. 186, SLA 1968 by itself or together with the proposed 1969 Alaska Commercial Fishing Regulations, Sec. 102.09 violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does Ch. 186, SLA 1968 by itself or together with the proposed 1969 Alaska Commercial Fishing Regulations, Sec. 102.09 violate either or both Sections 3 and 15, Article VIII, Constitution of the State of Alaska?

3. Did the District Court properly deny appellants' motion to dismiss or in the alternative to abate the action pending the determination of the Alaska Constitutional issues by the Alaska Court System?

4. Did the District Court properly grant appellees' motion for summary judgment in the light of the facts before it and the procedural and legal requirements of Federal Rules of Civil Procedure 56?

STATEMENT OF THE CASE

The Fifth Legislature of the State of Alaska, Second Session, passed in 1968 Ch. 186, Session Laws of Alaska, 1968. The text of the statute appears at pages

2-6, *supra*. In 1968 the Board of Fish and Game of the State of Alaska promulgated Sec. 102.09 of the 1968 Commercial Fishing Regulations relating to salmon net gear licenses. On July 5, 1968, appellees, non-residents of the State of Alaska, and previous holders of salmon net gear commercial licenses, filed their complaint herein. The complaint was based in large part upon the existence of Sec. 102.09, 1968 Commercial Fishing Regulations. Because of the lapse of time during the pendency of this action, a substantial portion of the matters alleged in appellees' complaint became moot and are not relevant to this appeal. On January 6, 1969, appellees moved to file an amended complaint. On February 14, 1969, the amended complaint was filed (A. 1). Insofar as pertinent to this appeal the amended complaint alleged that the appellees had applied for a 1968 license authorizing their operation of salmon net gear for commercial fishing in Alaskan waters and that the application for such licenses had been denied. Appellees alleged further that because of the operation of Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1969 Commercial Salmon Fishing Regulations of the State of Alaska, they could not qualify for Alaska salmon net gear licenses. Appellees further alleged that as a result of the statutory and regulatory provisions relative to the issuance of a State of Alaska commercial salmon net gear license, they were deprived of equal protection of the laws under Sec. 1, Article XIV of the Amendments to the Constitution of the United States of America, and further that they were denied rights guaranteed them by Article

VIII, Sec. 15 and Article VIII, Sec. 3 of the Constitution of the State of Alaska.

In support of matters alleged in the amended complaint and also in support of appellees' motion for summary judgment filed on December 2, 1968, Rudolph Plancich, one of the appellees, filed a supplemental affidavit on January 20, 1969 (A. 60). The supplemental affidavit of Rudolph Plancich stated that he was the owner of a purse seine fishing vessel representing an investment of approximately $45,000.00 and desired to obtain an Alaska commercial purse seine gear license for 1969 for use in Southeast Alaska. He was denied issuance of such license in 1968. The affidavit further stated that because of the application of Ch. 186, SLA 1968 and Sec. 102.09 of the Alaska 1969 Commercial Fishing Regulations, that he would not be eligible for issuance of a net gear license in Southeast Alaska in 1969. The affidavit stated also that as a result of affiant's inability to obtain a salmon gear license for fishing operations in the Southeast Alaska waters in 1969, he would suffer losses in the amount of $10,000.00 to $20,000.00 and that these losses would continue during each year he was denied the issuance of the license.

On September 16, 1968, appellants filed a motion to dismiss, or in the alternative, to stay the proceedings in the United States District Court pending the determination by the Alaska State Court System of the effect of Article VIII, Sections 3 and 15 of the Alaska State Constitution upon the issues of the case. The United States District Court set the time for

hearing on appellants' motion to dismiss, or in the alternative, to abate and on all other motions presently pending. The time for hearing was continued until February 14, 1969, at which time all motions then pending were heard by the Court.

On November 6, 1968, appellants filed a motion for summary judgment and suggestions of mootness (A. 29). The appellants urged that Sec. 102.09 of the 1968 Commercial Fishing Regulations of the State of Alaska were as of the date of the motion, November 6, 1968, of no further force and effect. The court ordered that the issue as to the legality and validity of the 1968 regulation was moot. The motion for summary judgment was based upon the fact that there was no actual controversy between the parties relative to the applicability or constitutionality of Ch. 186, SLA 1968. Appellants asserted that as of the date of the motion, appellees had not applied for and consequently had not been denied, salmon net gear licenses for 1969. Ch. 186, SLA 1968 governed the issuance of salmon net gear licenses only for 1969 and subsequent years. The issuance of the 1969 licenses was governed in part by regulations to be enacted by the Alaska State Board of Fish and Game subsequent to the date of the motion. The motion for summary judgment was supplemented by the affidavit of Augie Reetz, Commissioner of the Alaska Department of Fish and Game (A. 30), to the effect that none of the appellees had filed applications for issuance of 1969 commercial salmon net gear licenses for the State of Alaska and that the 1968 commercial salmon net gear fishing regulations for the State of Alaska were no longer in

force and effect. The affidavit further stated that the regulations of the Alaska Board of Fish and Game governing the issuance of 1969 commercial salmon net gear licenses had not yet been enacted.

On February 14, 1969, the matters raised in appellants' motion for summary judgment were heard. The decree filed March 20, 1969, denied appellants' motion for summary judgment, and denied appellants' motion to dismiss or abate (A. 78-79).

On December 2, 1968, appellees filed a motion for summary judgment (A. 32) on the basis that as a matter of law the statutory and regulatory provisions relative to the issuance of Alaska commercial salmon net gear fishing licenses deprived appellees, among other things, of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and rights granted by Article VIII, Secs. 3 and 15 of the Alaska Constitution. Appellees' motion for summary judgment was heard on February 14, 1969 and granted by the decree of the District Court filed March 20, 1969.

The decree of the Court filed March 20, 1969 (A. 78) ordered as follows:

1. That appellants' motion to dismiss and motion for summary judgment be and the same are denied.

2. Appellees' motion for summary judgment be and the same is hereby granted.

3. Ch. 186, Session Laws of Alaska 1968 and Sec. 102.09 of the 1968 Commercial Fishing Regulations are hereby declared to be unconstitutional under the

provisions of the United States Constitution and the Constitution of the State of Alaska.

4. That appellants, their successors in office and all persons acting as their agents, officers and servants or under their direction and authority be and they are permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce part 102.09 of the Alaska Salmon Commercial Fishing Regulations in the aforesaid Ch. 186, Session Laws of Alaska 1968, and from denying fishing gear licenses by reason of the authority thereof.

SUMMARY OF ARGUMENT

1. The statutory and regulatory provisions under attack in this action do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The classification of those persons who, under the provisions of Ch. 186, SLA 1968 immediately qualify for a salmon net gear license, and those who cannot immediately qualify is based on grounds which are relevant to the state's objectives of resource management and industrial safety. Also the classification is based upon a state of facts which could reasonably have been conceived by the legislature to justify the classification. The proposed regulations meet the same tests of constitutionality as are applicable to the statute.

2. An exclusive right of fishery has not been created in the salmon net gear fishery. The lower court erroneously concluded that there was no reasonable

basis for the requirement that a person who was licensed for three years as a commercial fisherman, and who engaged in the fishery could qualify for a net gear license. The court also erroneously concluded that entry into the fishery depended upon prospective applicant's ability to obtain employment by one already engaged as a salmon net gear fisherman. Since no exclusive right of fishery was created, the provisions of Article VIII, Sections 3 and 15 of the Alaska Constitution were not violated.

3. The District Court's determination of the merits of the case should have been postponed until the applicability of the Alaska Constitutional provisions could be determined by the Alaska Court System. The two grounds upon which abstention should be granted apply in this case. The entire case could be resolved by a determination of the state constitutional issues. Appellees have asserted that the entire statutory and regulatory framework must fall in the light of these provisions. When an issue may be resolved without resort to federal constitutional principles, abstention is appropriate. Also, the state constitutional provisions are unique and for this reason they should be interpreted as a matter of first impression initially by an Alaska court. The interpretation of the constitutional provisions for the first time by the United States District Court was an abuse of that court's discretion under the abstention doctrine.

4. The District Court granted summary judgment in favor of appellees and held the Alaska Statute and Regulations unconstitutional under the United States

and Alaska Constitutions. In granting that judgment the court relied heavily upon a fact not admitted and not properly in evidence before it. The fact relied upon was that a prospective salmon licensee who wishes to fish for salmon in any given year and then qualify for a net gear license must obtain employment by one who already possesses the right to fish under a salmon net gear license. Since the fact relied upon was so material to the court's conclusions, the judgment must be reversed and the necessary facts to support the statutory and regulatory provisions be shown at plenary proceedings.

ARGUMENT

I. NEITHER THE STATUTE NOR THE PROPOSED REGULATIONS UNDER ATTACK, WHETHER TAKEN SEPARATELY OR TAKEN AS A WHOLE, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. Summary of the provisions of the statute and regulations under attack.

The State of Alaska is by Fish and Game regulation geographically divided into eleven salmon registration areas, 5 Alaska Administrative Code, 39.120 (d)(1) (A. 83). Also each salmon net fisherman must be properly licensed and registered in the salmon registration area of his choice, 5 AAC 39.110 (A. 81). Chapter 186, Session Laws of Alaska, 1968 (hereinafter referred to as Ch. 186, SLA 1968), provided that a salmon net gear license may be issued only to a person who meets certain qualifications. Those quali-

fications are either (1) that he has previously held a net gear license for that particular salmon registration area; or in the alternative, that he has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that registration area. Sec. 4, Ch. 186, SLA 1968 gave authority to the Alaska Board of Fish and Game to establish additional qualifications relating to the eligibility requirements for gear licenses.

Ch. 186, SLA 1968 contains legislative findings that

> "(a) . . . excessive entry into Alaska fishing areas have resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource."

and

> "(b) . . . the uninhibited issuance of gear license to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area."

The legislature found further:

> "(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before the issuance of salmon gear licenses to applicants."

Pursuant to its authority granted by Section 4, Ch. 186, SLA 1968, the Alaska Board of Fish and Game

considered the establishment of additional qualifications relating to the eligibility for gear licenses. The additional qualifications would have limited the eligibility for a 1969 salmon net gear license to a person who either, (1) held in 1965 or subsequent years, a salmon net gear license for that specific salmon registration area; or, (2) in the alternative to a person who has, for any three years, since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area (proposed Section 102.09, 1969 Alaska Commercial Fishing Regulations) (A. 13-17). Those proposed regulations were never adopted by the Board of Fish and Game.

B. Ch. 186, SLA 1968 is permissible state regulation under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Appellees have attacked Ch. 186, SLA 1968 on the ground that it denies equal protection of the law to those persons who are not included within that class of persons eligible for a salmon net gear license. On the other hand appellants assert that the limitations and requirements imposed by the legislature are the products of a valid exercise of state regulatory power. A consideration of the decisions of this court relative to the exercise of state regulatory power in the light of the Equal Protection Clause of the United States Constitution will make the correctness of appellants' position clear.

McGowan v. Maryland, 366 U.S. 420 (1961) is one of the latest opinions wherein this court has consid-

ered the application of the Equal Protection Clause to state regulation of economic activity. In *McGowan* the issue was whether a Maryland statute which, with certain exceptions, prohibited all labor, business and commercial activity on Sunday was constitutional. Exempted from the statute was the sale of items of bathing apparel, dance hall and amusement park activities and certain other activities conducted within specific localities within the state. One ground of constitutional attack was that the statute violated the Equal Protection Clause of the Fourteenth Amendment. This court stated the applicable principle:

> "Although no precise formula has been developed, the Court has held that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (366 U.S. at pages 425-426)

In *McGowan* this court recognized that even though some inequality may result from a legislative classification, the legislature is presumed to have acted within its constitutional authority. Thus, while it may be true, that because of the provisions of Ch. 186, SLA 1968 some aspirants to a salmon net gear license may

not be immediately entitled to it, there exists the presumption in favor of the constitutionality of the legislative act.

Moreover, the constitutionality of the legislative act is supported by much more than this presumption when the two criteria of *McGowan* are considered. (1) That the creation of the classification must rest on grounds relevant to the state's objectives; and (2) that a legislative classification is not arbitrary if any state of facts can be reasonably conceived to justify the classification. The two tests of *McGowan* must be considered in the context of the resource, salmon, and the industry, salmon fishing, which the statute is intended to govern.

The statute under attack must have been enacted by the legislature with some awareness of the nature of salmon and the nature of salmon fishing. The family *Salmonidae* is native to the North Temperate Zone and is largely limited to the North Pacific rim. The Pacific salmon breeds (spawns) in fresh water, hatches from its eggs in fresh water, and depending upon the species, either remains in fresh water for a year, or swims directly to the sea. All salmon eventually travel to the ocean to feed until maturity. In the sea they spend varying amounts of time, up to five years, then early in the summer of their last year they return to the same stream in which they hatched to spawn, thus starting anew the life cycle. *Salmon, The Living Resource,* Fisheries Association of B. C. (and others), Agency Press, Limited (Canada), p. 9. Salmon migrate from the ocean in mass movements,

known as runs. The timing of the run depends on the species, and water conditions, *Ibid.*, at 10.

One objective of modern salmon management is to allow sufficient salmon to escape to the spawning grounds in order that the population may be maintained at an optimum level. *Ibid.*, at 17. The relationship between salmon net gear and escapement can be made clear by describing the typical salmon net gear and its operation. The two types of net typically used from salmon fishing vessels are (1) purse seines; and (2) gill nets. A purse seine is a net rigged with floats and weights which is let out and then closed in a circle enclosing all the salmon within it. A "purse line" at the bottom of the net is closed to prevent the salmon from escaping. The entrapped fish are then placed on the vessel by a variety of means. Washington State Department of Fisheries, *Pacific Northwest Marine Fishes,* at page 10 (1967). The amount of the possible catch of fish will vary with the length of the net and the depth of the net. J. Garner, *How to Make and Set Nets,* at page 69 (1962). A gill net also varies as to length and depth. The mesh of a gill net is of a size which permits a salmon to put its head, but not its body, through the net. When it attempts to back out, its gills are caught in the net. Floats hold the top of the net and weights hold the bottom so that it is practically vertical. Washington State Department of Fisheries, *Pacific Northwest Marine Fishes,* at page 10 (1967).

One other method which may be used for commercial salmon fishing from a vessel is trolling. This does

not involve net gear, but consists of dragging lines through the water at slow speeds. The fish are caught on baited hooks. This method is less efficient, generally, than those methods employing salmon net gear. Washington State Department of Fisheries, *Pacific Northwest Marine Fishes,* at pages 10-11 (1967).

The relationship between the amount of net gear and escapement is clear. If sufficient gear is employed, most of an entire run may be taken. If the amount of possible gear may be reduced, then the likelihood of such a taking of salmon is reduced. The need for escapement of a sufficient portion of each run is necessary since each run may vary biologically from every other. Assuming that varying racial characteristics are desirable, then escapement from each run is desirable, University of Washington, Publications in Fisheries, New Series, Vol. II, No. 1, *Salmon Gear Limitations in Northern Washington Waters,* at pages 18-19 (1963). The relationship between net gear limitation and management is stated at pages 35 and 36 of the above cited University of Washington study:

> "Totally aside from any economic gains, gear limitation can provide definite benefits to the conservation of the resource and at the same time provide more fish to the fishermen.
>
> During moderate-sized runs with the present level of gear, fishing must be curtailed to as little as two days per week in order to allow the necessary escapement. Short fishing periods with very high fishing intensities can result in alternate over-fishing and under-fishing of a series of races that pass rapidly through the fishery. The return from this kind of regulation can result

in numbers of progeny below the reproductive capacity of the parent stocks.

Short fishing periods hinder the management agencies in their task of getting information on the status of the runs. The result of regulation with insufficient information can result in management decisions more conservative than needed or, on the other hand, decisions that reduce needed escapement."

Although the above quoted study applies to the Puget Sound Fishery, its conclusions as to the effect of over accumulation of net gear apply to Alaska.

With the background described above, the statute under attack easily meets the two tests of *McGowan* described on page 19, *supra*. First, the creation of a class of those who are presently entitled to a salmon net gear license as distinguished from those who must perform some further act in order to be entitled to such a license rests on grounds which are relevant to the achievement of the state's objectives. The state's objectives, as described by the legislative findings may be enumerated as follows:

1. To reduce the amount of salmon gear in Alaska fishing areas in order to aid in the conservation and management of the resource.

2. To increase public safety in Alaska fishing areas by increasing a fisherman's knowledge of the regulations, waters and fishing procedures in each salmon registration area. The statutory classification is relevant to the state's objectives. First, the limitation of a salmon net gear license to either (1) those persons

who have previously held a salmon net gear license for a particular salmon area; or (2) those who have while licensed as a commercial fisherman fished in that specific area for three years, will tend to limit the entry of licensees into Alaska salmon fishing areas. This limitation must necessarily follow since prior to the legislation no restrictions on net gear licensees were imposed except for the payment of a license fee. As shown above at page 21 with fewer net gear licensees in a salmon registration area, the objective of conservation and management of the resource will be aided. With fewer net gear fisherman, it is likely that fewer fish will be taken.

Also, by requiring that in order to be licensed for a particular area, a licensee must either have been licensed there before, or must have commercially fished the area for three years, the legislature is achieving the objective that the licensee be familiar with the area and familiar with the regulations applicable to the area. It must necessarily follow that in salmon net gear fishing, as with any other undertaking, familiarity with the area of work and the regulations and procedures incident to that work will most likely result in a safer operation and one more free from violations of any applicable regulations. Once again the state's objective is accomplished.

Secondly, *McGowan* also stands for the proposition that a distinction in legislation should not be set aside and is not arbitrary, if any state of facts can reasonably be conceived to justify the distinction. See also *New York Rapid Transit Co. v. New York,* 303 U.S.

573 (1938). The statute under attack must have been enacted by the legislature with some awareness of the above described methods and means employed in commercial salmon gear fishing. In addition to those methods and means, the legislature was aware of the fact that in order to harvest an optimum amount of the resource, and at the same time provide for escapement, the Department of Fish and Game opens and closes the areas surrounding the mouths of spawning streams by emergency order during the seasons. These orders are usually made by radio announcement. Also most streams are closed within a certain area outside their mouths, and even entire bays, inlets and estuaries may be closed to commercial salmon fishing. The closures are usually indicated by markers, either on shore, or by buoy or both.

It is also well known that commercial salmon net gear fishing must of necessity be carried out upon the open sea and channels. Any enterprise located upon the open sea and channels, especially in Alaska, is affected by weather, which in turn affects the character of the sea upon which the activity is pursued. Furthermore, the bottom characteristics of that sea vary from place to place, and even from time to time, depending upon the tide, wave action and other factors.

With this background the legislature could have reasonably conceived all or any part of the following state of facts:

1. In 1968 there was such an accumulation of salmon net gear in the State of Alaska that the

salmon resource was threatened due to overharvest and lack of escapement.

2. That there is a direct correlation between the amount of salmon net gear and the amount of harvest.

3. That by 1968 many licensees were acquiring salmon net gear licenses who had no previous experience in the industry, and that the lack of experience was particularly felt in the following fields:

a. Unfamiliarity with the basic marine characteristics of the area within which licensees desider to fish including tidal action, bottom characteristics and effect of weather.

b. Unfamiliarity of licensees with the particular closure devices and markers used by the Alaska Department of Fish and Game for the purpose of marking stream mouths and for closing a local area completely.

c. Unfamiliarity with the Methods and Means used in safely pursuing commercial salmon gear fishing.

d. Unfamiliarity with regulations pertaining to a commercial salmon net gear fishing.

On the basis of its foregoing reasonable assumptions, the legislature could reasonably deduce the following:

1. That a person who has previously held a salmon net gear license in a particular area most likely will be sufficiently familiar with the areas of legislative concern so as to be entitled to further licensing.

2. That a person who has actively engaged in commercial fishing in a particular area while licensed as a fisherman for three years will have become sufficiently familiar with the area of legislative concern so as to be entitled to further licensing.

This court has recognized that a legislative classification of the type here under attack meets the requirements of the Equal Protection Clause. In *Kotch v. Board of River Pilot Commissioners for the Port of New Orleans,* 330 U.S. 552 (1947) this court held constitutional a Louisiana statute providing for the licensing of pilots for the Port of New Orleans. The particular statute required all seagoing vessels between New Orleans and foreign ports be navigated exclusively through the approaches to the port of New Orleans by State Officers licensed as pilots. Only those persons who had served a six month apprenticeship under active pilots could be certified to the governor for appointment. Appellants in the *Kotch* case had had at least 15 years experience as pilots elsewhere, but had not served the required six months apprenticeship in New Orleans. It had also been shown that by and large only relatives and friends of incumbent pilots had ever been selected as apprentices. The court observed that the constitutional requirements of equal protection might be offended if the classification rested on a basis not at all related to achieving the state's objective. As an example the court indicated that if the licensing qualification depended upon race, religion or any other basis not at all related to the regulated activities, the qualifica-

tions would be invalid. See *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) where a person was denied the right to engage in the laundry business because of the peculiar application of the act in question to Chinese laundries. There was no relationship between one's being Chinese and the operation of a laundry which could justify the classification.

In upholding the statute in *Kotch* this court recognized that

> "In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters." (330 U.S. at page 558)

In the case at hand the Alaska legislature has determined that familiarity with local fishing areas is a necessary objective to insure safety and ease of enforcement.

Moreover the statute here under attack is much more liberal than that under attack in *Kotch.* The application of the statute in *Kotch,* had in fact created a closed class, in that only those persons related or friends of the existing pilots could become apprenticed. The Alaska statute clearly allows anyone to become a salmon net gear licensee if he fishes, on his own, commercially for three years. Thus, unike *Kotch,* the licensee holds the key to the license in his own hand. He may gain entrance, under that set of circumstances, after three years.

Two other decisions of the United States Supreme Court round out the requirements relative to consti-

tutionality of Ch. 186, SLA 1968 under the Equal Protection Clause. *Morey v. Doud,* 354 U.S. 457 (1959) involved the constitutionality of Illinois statute regulating currency exchanges. All currency exchanges except the American Express Company were prohibited from doing certain acts. In holding the statute unconstitutional this Court found that a closed class was created and that the closure was not related to the legislative objective. The Court in *Morey* quoted with approval from *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911), the following criteria for determining whether a classification is valid:

> " '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequity. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. [Case cited.]
>
> To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether

they are obnoxious to the constitutional provision.'" (354 U.S. at pages 463-464.)

Applying the criteria of *Morey* to the case at bar we find the following: 1. The classification is not purely arbitrary. The classification of eligible licensees into those who (1) have had a salmon net gear license for a particular area, or (2) those who have had a commercial fishing license in a particular area is reasonably suited to remedy some of the problems found by the legislature. The classification promotes the accumulation of less gear and insures that applicants have a basic minimum of experience by requiring that an applicant must have been licensed for net gear previously or that he must have fished the area commercially.

2. *Morey* recognized that the classification need not be devised with mathematical nicety. It might be shown that some of those who have previously held net gear licenses in a particular area are not in fact as knowledgeable as the legislature would desire. However, the probabilities are in favor of such a licensee having the sought after experience and the required knowledge. Also it might be shown that some licensees could become familiar with the particular area only after one or two years of commercial fishing. However, on the other hand it might be shown that some licensees would require four or five years to achieve the necessary familiarity. Although not mathematically exact, the three year commercial fishing requirement is reasonable to achieve the legislative objective.

3. It has earlier been shown that the classification rests on a state of facts which the legislature could reasonably conceive to support it, *supra* pages 24-25.

4. The burden rests on appellees to show the essential arbitrariness of the legislative classification. The affidavit of Rudolph Plancich merely shows that he is a commercial salmon fisherman who has invested considerable time and money in his profession. It fails to demonstrate the arbitrariness of the statute. Appellees may argue that since their interrogatories are directed to matters upon which the legislature made findings, and since the Department of Fish and Game has not compiled data of the type requested by appellees, the legislative findings are of no effect. Appellees' position is not well taken. The interrogatories were directed to the appellants who in turn are the Commissioner and the Board of Fish and Game for the State of Alaska. The fact that the appellants have not made an analysis of their records in the detail which would satisfy appellees, or even do not possess the type of record which would satisfy them, does not detract from the basis upon which the legislature made its findings. The legislature, a separate branch of government, is not bound by the knowledge of the executive, and may consider matters not within the knowledge of the executive. Thus the answers to appellees' interrogatories do not aid the appellees in meeting the burden upon them to show the essential arbitrariness of the classification.

5. The classification here involved is not unusual in the sense that the classification in *Morey* is un-

usual. The class for eligible applicants remains open, and those admitted to the class are not specific individuals, but any person meeting the requirements. It is useful, therefore, to consider what is required in order to obtain a commercial fishing license in Alaska. The issuance of a commercial fishing license is governed by AS 16.05.540, (A. 18), providing that such a license is a prerequisite to commercial fishing and may be obtained by payment of a $10.00 fee by residents and a $30.00 fee for non-residents. The regulatory provisions impose no other requirements upon the issuance of a commercial fishing license. With such a license one may engage in any type of commercial fishing in Alaska, except salmon net gear fishing. This would include, among others, trolling for salmon, halibut fishing, and working aboard a licensed salmon net gear vessel.

This court has also established the criteria that the discrimination must be "invidious" to fall within the prohibition of the Equal Protection Clause. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) the court was interpreting an Oklahoma statute regulating the prescription, preparation and fitting of eyeglasses. The statute excluded from regulation certain ready to wear glasses, sunglasses and industrial glasses. The court, in holding the statute constitutional stated that "[T]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (348 U.S. at page 489). It cannot be stated that the classification by which certain persons are excluded from the class eligible to

obtain salmon net gear licenses is invidious especially when the class is not closed, but remains open to those who will attempt to qualify. See also *Corsa v. Tawes*, 149 F.Supp. 771 (D.C., Md., 1957) in which a statute limiting the use of purse nets in Maryland tidal waters excluded non-residents and seriously limited the commercial fishery. The District Court for the District of Maryland stated in holding the statute valid:

> "While in the exercise of this power the State is not immune from recognized constitutional limitations, it is to be remembered that in the field of conservation, as in other, courts will not strike down legislative enactments as violative of due process unless the means chosen has no reasonable relation to the objective sought to be accomplished." (149 F.Supp. at page 773)

Even though *Corsa v. Tawes* spoke in terms of due process, the same may be said when the attack is based upon a denial of equal protection of the laws. The State of Alaska has a valuable resource, its salmon, to conserve and protect. The means it has employed is reasonable and the statute should be upheld.

C. The proposed regulation, Sec. 102.09 of the 1969 Commercial Fishing Regulations, is permissible State regulation under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The foregoing discussion has related only to the statutory provision, Ch. 186, SLA 1968. The lower court failed to isolate the statute from the proposed 1969 Commercial Fishing Regulations. The opinion was directed to the "licensing scheme" in its entirety, including the proposed regulations. Since, however,

the statute is complete on its own, and may be effective without additional regulations the appellants urge that this court consider the constitutionality of the statute and of the proposed regulations separately. This approach is imperative, since, in fact the proposed regulations with which the lower court concerned itself had not been adopted as of the dates of the opinion and decree have not yet been adopted.

Notwithstanding the above comments, appellants assert the proposed regulations, had they been adopted by the Alaska Board of Fish and Game are constitutional. The statute under attack, Ch. 186 SLA 1968, contained an amendment to AS 16.05.250 allowing the Alaska Board of Fish and Game to "establish additional qualifications relating to the eligibility requirements for gear licenses." Pursuant to the authority granted by that amendment regulations were prepared which would restrict the issuance of a salmon net gear license to a person who

> "(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon regulation area; or
>
> "(B) has for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."
>
> (Proposed 1969 Alaska Commercial Fishing Regulations, Sec. 102.09)

It was asserted by appellees and held by the District Court that these regulations together with the statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The same principles apply in respect to determining the constitutionality of a regulation as in the case of a statute, *Robinson v. Stcte of Florida,* 378 U.S. 153 (1964). Thus the test of the reasonableness of the regulation in the light of any state of facts which could reasonably be conceived, applies. In the case of these regulations the following facts may reasonably have been assumed and considered by the Board of Fish and Game in adopting the regulations:

1. That a person holding a salmon net gear license prior to 1965, but who did not hold such a license in 1965 or in subsequent years does not possess sufficient knowledge, experience and familiarity with the specific salmon regulations. As in any type of endeavor, the methods and means of undertaking commercial net gear fishing vary as time progresses. Regulations and procedures change, and bottom and estuary characteristics in local areas change due to tidal and wave action. Thus even though not delineated with mathematical certainty, the Board of Fish and Game could reasonably conclude that anyone who had not held a salmon net gear license since 1965, did not possess the required knowledge.

2. That a person who has not held a commercial fishing license for any three years since 1960 does not possess the type of knowledge set forth in the preceding paragraph. Also, since a person, in order to qualify for a gear license under the commercial licensing provisions, must hold a commercial license for three years, it is reasonable to consider as eligible, persons who were licensed in earlier years than those per-

mitted for licensee qualifying under the (A) section. More years of licensure are required, hence the likelihood of someone qualifying on the basis of at least one year after 1965 is great.

Also for the reasons shown above, the classification by regulation is not arbitrary or invidious.

II. NEITHER THE STATUTE NOR THE PROPOSED REGULATIONS UNDER ATTACK, WHETHER TAKEN SEPARATELY OR TAKEN AS A WHOLE, VIOLATE ARTICLE VIII, SECTION 15 OF THE ALASKA CONSTITUTION (PROHIBITING AN EXCLUSIVE RIGHT OF FISHERY) OR ARTICLE VIII, SECTION 3 OF THE ALASKA CONSTITUTION (RESERVATION OF FISH AND WILDLIFE TO THE PEOPLE FOR COMMON USE).

Article VIII of the Alaska Constitution provides in part as follows:

> "Section 3. *Common Use.* Whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

A. Ch. 186, SLA 1968 is valid under the quoted provisions of the Alaska Constitution.

Since the District Court dealt more extensively with the applicability of Section 15, that section will be considered first and more extensively.

Article VIII, Section 15 is based upon the White Act of June 18, 1926, 44 Stat. 752, a Federal Act, which applied to Alaska fisheries. The Act gave the

Secretary of the Interior administrative control over Alaska fisheries and the authority to make such regulations concerning those fisheries as he deemed advisable. The Act, in pertinent part provided that:

> ". . . no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce."

The leading case involving the construction of the White Act is *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). The Secretary of the Interior delegated exclusive use and control of a particular salmon spawning stream on Kodiak Island to a specific Indian tribe. The United States Supreme Court held that the Secretary's delegation of exclusive use was in violation of the White Act. The court concluded that the result of the administrative action was to delegate all future control over the fishery to the Indian tribe and their assignees. The regulation prohibited commercial salmon fishing in the general area of the Karluk Indian Reservation of Kodiak Island, except that

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives." (50 CFR 1946 Supp. Sec. 208.23)

The Supreme Court determined that a special privilege in and to Alaska fishing preserves had been granted.

On the basis of the *Hynes* case the District Court in this case found that the statute and regulations here involved granted an exclusive right of fishery. The District Court relied on an opinion of the Alaska Attorney General dated February 9, 1969. The Attorney General's Opinion dealt with a proposed Commercial fishing regulation which would limit the issuance of salmon net gear licenses to only those persons who obtained such licenses in 1966 or 1967 (A. 38). The opinion specifically noted that licenses could only be issued to those who obtained gear licenses in 1966 or 1968 (sic 1967). The present statute, Ch. 186, SLA 1968 creates a much broader class than the regulation disapproved by the Attorney General. What was a narrow closed class became an open ended class by virtue of the provisions of the 1968 regulations allowing new entry by public drawing (Exhibit "A" to Complaint filed July 5, 1968). The distinction was recognized and approved by the Attorney General when by letter dated February 16, 1968 he approved proposed Section 102.09 of the 1968 Commercial Fishing Regulation (A. 52). The provisions for new entry under the provisions here under attack are broader than those approved by the Attorney General.

Appellees urged and the District Court found that only those who were permitted by the present class of salmon net gear licensees could obtain the sought after license. (See pages 48-49, *infra,* for a discussion of appellants' contention that the District Court's finding in that respect was not supported by the evidence.) The Court stated:

> "The fact that he might do so [obtain a commercial license], even though he could never, without the aid of an established net-gear licensee, have previously gained experience in an area with gear essential to salmon fishery does not harmonize with defendants' argument that the challenged scheme is designed to promote safe operation by experienced fishermen." (A. 75)

The District Court thus summarily disregarded the means whereby new entrants could enter the class of salmon net gear licensees by stating that the entry by commercial fishing licensees did not harmonize with the state's objective of increased safety and knowledge. In so doing, the court disregarded the fact that many aspects of fishing safety are common to all phases of the trade. Salmon net gear fishing may, however, impose additional safety requirements and additional knowledge of technique. The legislature therefore was seeking that the prospective licensee be well versed in the basic knowledge required of all fishermen before he be allowed a salmon net gear license. This court has held that a statute need only address itself to that particular phase of a problem which to the legislative mind seems most acute, and that all phases of a problem need not be dealt with at one time, *Williamson v. Lee Optical of Oklahoma, supra,* pages 31-32. Thus the legislature need only assure itself that aspiring salmon net gear licensees have a basic understanding of technique. For this reason the District Court's finding that there was no purpose to the legislation is clearly erroneous. The District Court's reliance on the *Hynes* case and the Attorney Gener-

al's Opinion of February 9, 1968 are for the same reason misplaced. It is useful to note that the Supreme Court of the United States in the *Hynes* case recognized that wide discretion must be vested in those who are responsible for the control of Alaska's fisheries. The Court quoted with approval an extract from the legislative history of the White Act:

> "The waters of Alaska are so vast and the local conditions so varied that it is utterly impossible to prescribe by legislation in detail the provisions necessary to meet each situation. To attempt to do so would be to defeat the purpose sought. This can be done by placing broad powers and a wide discretion in the administrative branch having charge of the subject." (337 U.S. at page 121)

The statute under attack seeks to provide the framework within which the Department of Fish and Game may overcome problems posed by the vastness of Alaska's waters and the variance in local conditions. In seeking to achieve this result, an exclusive right of fishery has not been created.

The District Court did not deal separately with the provisions of Art. VIII, Section 3 of the Alaska Constitution which reserves wildlife and fish for the common use of the people. Thus, what has been stated above in respect to the creation of an exclusive right of fishery applies equally to the common use provision.

B. The Proposed Regulations are Valid under the above quoted provisions of the Alaska Constitution.

As in the case of the application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States to the statutes and regulations, the District Court failed to deal separately with the statute and the proposed regulations under the relevant Alaska Constitutional provisions. The statute can and does stand on its own and for this reason appellants urge that this court consider the constitutionality of the statute and the proposed regulations separately.

The same comments regarding the constitutionality of the proposed regulations under the Fourteenth Amendment are applicable to their constitutionality under the common use and exclusive right of fishing provisions of the Alaska Constitution. The proposed regulations have made it possible for anyone to obtain a salmon net gear license if they have fished commercially for three years after 1960 or have been licensed as a net gear licensee for any year from 1965 on. There is no exclusive right of fishery created.

III. THE PROCEEDINGS ON THE MERITS OF THE CASE SHOULD HAVE BEEN STAYED OR ABATED BY THE DISTRICT COURT PENDING THE DETERMINATION BY AN ALASKA COURT OF THE EFFECT OF ARTICLE VIII, SECTIONS 3 AND 15, ALASKA CONSTITUTION UPON THE STATUTES AND REGULATIONS HERE INVOLVED.

Appellees asserted in their complaint and amended complaint that the statute and regulations under attack violated Article VIII, Sections 3 and 15 of the

Alaska Constitution. Those provisions are set out at page 3, *supra*. On September 16, 1968, appellants filed a motion to dismiss appellees' action, or in the alternative to stay the proceedings in the United States District Court pending the determination of the Alaska Constitutional question by an Alaskan court (A. 28). Appellants' motion to dismiss or abate was denied (A. 78). Appellants assert that the District Court committed error by that denial.

Appellants do not dispute the fact that the United States District Court had jurisdiction under 28 USC Sec. 1331(a). The issues raised by appellees presented a substantial federal question under the Fourteenth Amendment to the United States Constitution. However, appellees asserted also that the statute and regulations violated the Alaska Constitution. On that ground appellants moved that the District Court, in the exercise of its discretion, withhold relief or dismiss the action pending the determination of the state constitutional issues by an Alaskan court.

The Federal doctrine of abstention which is clearly applicable to this case had its origin in *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941). That case involved an action to enjoin enforcement of a rule of the Texas Railroad Commission requiring all Pullman cars to be in charge of a Pullman conductor. The rule was alleged to be in violation of state law in that the commission had no authority to enact such a regulation. The action was remanded to the federal district court with directions to retain jurisdiction pending a determination of issues involving state law in the state court. This Court stated:

"The lower [federal district] court did deny that the Texas statutes sustained the commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by state adjudication. The reign of law is hardly promoted if an unnecessary ruling of federal court is thus supplanted by a controlling decision of a state court. . . .

Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, . . . or the final authority of a state court to interpret doubtful regulatory laws of the state." (312 U.S. at pages 500-501)

The doctrine of arbitration established in the *Pullman* case rests on two sound policy considerations. First, the Federal constitutional issue should not be determined if the case can be determined on other

grounds, and second, state courts should have the first opportunity to interpret state laws and regulations. Both of these considerations apply with vigor to the present case. The state constitutional issues raised by the complaint and amended complaint encompass the entire statutory and regulatory framework. The entire litigation could possibly have been resolved at the state court level without the necessity of determining the Federal constitutional issue. The second consideration is even more applicable and important. Article VIII, Sections 3 and 15 of the Alaska Constitution has never, as such, been interpreted by any court. The provisions of Section 15 are uncommon in other constitutions, the only other states with provisions remotely similar are California (Article I, Section 25), Hawaii (Article X, Section 3), Rhode Island (Article IV, Section 90), and Vermont (Article II, Section 53). The constitutional provision relates to an asset unique in its abundance in Alaska, its fish resource. The statute and regulations relate to the same unique resource, the management of which is a matter of great state concern. The first judicial application of these constitutional provisions properly should be by an Alaska Court.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) the Supreme Court recognized that the validity under state law of orders of state regulatory agencies affecting the conservation of a basic resource should be decided by state courts. The order attacked in *Burford* was one of the Texas Railroad Commission granting

a permit to drill four wells in the East Texas Field. The order was attacked both on State and Federal grounds. The Supreme Court observed that the problem of conservation of oil and gas in Texas is "an aspect of 'as thorny a problem or had challenged the ingenuity and wisdom of legislatures'" (319 U.S. at page 318). The problem of regulation of and conservation of the Alaska salmon resource is equally as thorny a problem. The Supreme Court in *Burford* recognized the confusion caused by federal court interpretation of the applicable state law (319 U.S. at page 329) and affirmed the District Court's dismissal of the complaint. The Court stated:

> "These questions of regulation of the industry by the State administrative agency, . . . so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." (319 U.S. at page 332)

The policy upon which the applicable Alaska state constitutional provisions here involved is based is likewise so uniquely applicable to the State of Alaska that the first consideration of the applicability of those provisions to the statute and regulations should be by an Alaska Court. It is important that the Supreme Court in *Burford* did not order abstention, as it did in the *Pullman* case but ordered the case dismissed.

The significance of the doctrine of abstention to the relationship between the state and federal courts is made clear in *Alabama Public Service Commission v.*

Southern Railway Co., 341 U.S. 341 (1951). That case was one wherein the Alabama Public Service Commission denied the Railway Company the right to discontinue certain trains. The Railway Company had a right to appeal this administrative decision to the Alabama State Courts but elected instead to file a complaint in the United States District Court basing jurisdiction on diversity of citizenship and federal question. The United States District Court enjoined the Public Service Commission from enforcing its order. The U.S. Supreme Court reversed the judgment of the District Court. The Supreme Court stated:

> "Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts', is convinced that the asserted federal right cannot be preserved except by the granting of the 'extraordinary relief of an injunction' in the federal courts." (341 U.S. at pp. 349-350)

The significance of the decision in the *Southern Railway* case lies in the fact that the Supreme Court recognized that there was no individual state law involved requiring definitive construction. The Court considered that abstention was appropriate when questions of domestic policy were concerned:

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the statutes." (341 U.S. at page 351)

Similarly in this case the District Court should have withheld relief so as to allow the basic question of domestic policy, raised by the constitutional provisions to be decided by an Alaska Court.

City of Meridian v. Southern Bell Telephone & Telegraph Company, 358 U.S. 639 (1959) was before the United States Supreme Court in a context almost identical with the case at bar. A Mississippi statute imposing a charge on public utilities for using public streets was attacked as violating the Federal and State constitutions. The District Court entered a judgment declaring the statute in conflict with the State and Federal constitutions. That judgment was affirmed by the Court of Appeals for the Fifth Circuit. The Supreme Court remanded the case to the District Court with directions to hold it pending a determination of applicable state law by a state court. Thus in *Meridian,* as here, the District Court found the statute in question violative of both state and federal constitutional provisions. In *Meridian,* as here, there was no argument that the state constitutional provisions were ambiguous or needed judicial clarification. The issue, simply stated, was which court should decide state constitutional issues first. The *Meridian* case clearly holds that a state court should:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal constitutional question." (358 U.S. at page 641)

The reason for this is sound:

> "In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the federal constitution, the federal court should hold its hand less it render a constitutional decision unnecessarily." (358 U.S. at page 641)

See also *Clay v. Sun Insurance Office,* 363 U.S. 207 (1960). No clearer authority is necessary to point out the District Court's error in failing to allow the proper Alaska Court to decide the state constitutional issues.

An exception to the doctrine of abstention not applicable to the case at bar is found where it is alleged that a state statute or regulation may abridge fundamental civil liberties. Typical of such cases are those involving religious liberties and freedom of speech, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), school segregation; *Romero v. Weakley,* 226 F.2d 399 (9th Cir. 1955) and freedom of speech; *Zwickler v. Koota,* 389 U.S. 241 (1968); *Baggett v. Bullitt,* 377 U.S. 360 (1964) and *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

The present case is clearly distinguishable from those applying the exception. Hence, this Court should, if it does not rule on the merits favorable to appellants as to parts I and II hereof, remand this case to the Federal District Court, or dismiss the case, pending the determination of an Alaska Court of Alaska constitutional issues.

IV. APPELLEES' MOTION FOR SUMMARY JUDGMENT WAS NOT PROPERLY GRANTED IN THAT THE COURT ASSUMED FACTS NOT PROPERLY BEFORE IT.

A. The District Court, in granting appellees' motion for summary judgment assumed facts not properly before it.

Federal Rule of Civil Procedure 56(c) states when the granting of summary judgment is proper:

> "The judgment sought shall be rendered forthwith if the pleading, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law."

Part I of this brief is directed to appellants' assertion that appellees were not entitled to judgment as a matter of law. This portion of the brief is limited to the narrow issue that the court assumed a fact not properly in evidence, either by any affidavit, answer to interrogatories, or pleading in support of its decree granting summary judgment to appellees. The court stated:

> "Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish the area." (A. 70-71)

There is nothing in the record to support the above quoted conclusion of the court. The court disregarded the fact that in order to fish for salmon under a commercial license one may fish without gear. Trolling for

three years would also qualify an individual for a gear license.

The court also stated:

> "Under the scheme, entry into the salmon industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire." (A. 71)

That statement is not supported in the record. In effect the court is stating the statute is unconstitutional in its application. However, there is nothing by any admissions in the pleadings, affidavits, answers to interrogatories or otherwise to support this conclusion. The statutes themselves refute it by allowing a licensee to acquire a salmon net gear license after three years of active commercial fishing. The relevant Alaska statutes pose no requirement for obtaining a commercial license, save the payment of a nominal fee, AS 16.05.480.

Since an analysis of the District Court's opinion compels the conclusion that its decision was based upon the erroneous assumption of facts noted above, that decision should not stand and must be reversed.

B. The court, if appellants were not entitled to judgment as a matter of law, should have denied appellees' motion for summary judgment and determined the merits at a plenary proceeding.

Appellants have urged in Part I of this brief that the statute and the regulations are not unconstitutional on their face. For that reason summary judg-

ment was improperly granted in favor of appellees. Therefore, as to the issue of whether appellees' motion for summary judgment should have been granted there was no dispute as to a material issue of fact. Hence, the statement of genuine issues required by Rule 5(H)(2) (A. 76 Fa.5) of the Rules of the District Court for the District of Alaska was not filed. There were no genuine issues, relative to appellees' motion, necessary to be litigated. On the other hand, if facts had been alleged by affidavit to the effect that, as the Court assumed, entry into the class of salmon net gear fishermen was dependent upon one's being hired by one already engaged in that trade, most certainly a factual dispute would exist in respect to appellees' motion and the required statement would have been filed. The fact that the court had to reach out for such evidence to support its decision underscores appellants' position that there was nothing properly before it upon which summary judgment could be rendered for appellees.

In the event that the District Court might not be willing to deny appellees' motion on the basis of the legal bases set forth in Part I hereof appellants urge that the court allow them an opportunity to furnish evidence upon the issue of the reasonableness of the

statute and regulations. Such evidence was not legally required in order for appellants to prevail, but may have been helpful to the court. The fact that additional evidence may be helpful to the court in resolving the issue in favor of appellants is quite different from appellants' position that there was no factual dispute relative to the necessity of denying appellees' motion for summary judgment. Judge Frank of the Second Circuit recognized this distinction in *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (2nd Cir. 1946). In that case each party moved for summary judgment. The Court of Appeals affirmed the granting of plaintiff's motion and commented:

> "It does not follow that, merely because each side moves for summary judgment, that there is no issue of material fact. For, although a defendant may, on his own motion assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists." (154 F.2d at page 784)

Similarly, appellant should have been allowed to show in plenary proceedings, that as it candidly asserted, proven facts would justify the ultimate rendition of judgment in its favor. Those facts would have pertained to the reasonableness of the statute and regulations in the context of the salmon industry in Alaska. Such facts could have shown (1) whether or not management problems exist in respect to the

salmon fishing; (2) the effect over-accumulation of gear has had on management of resource; (3) expert testimony on what the effect of the proposed regulations would have on accumulation of salmon net gear; (4) whether or not safety problems exist in respect to the salmon industry; (5) whether or not law enforcement problems exist in respect to the salmon industry; (6) the effect of inexperience in the basic techniques of fishing upon safety and enforcement. The above is only the barest summary of what appellants should have been allowed to develop in plenary proceedings if the court was unwilling to hold the statute and regulations constitutional on their face. This they were not allowed to do because of the District Court's failure to recognize that what may have been helpful in the way of additional facts to support judgment for appellants may not at all be necessary to support appellants' position that appellees were not entitled to summary judgment as a matter of law on the basis of the facts then before the District Court.

CONCLUSION

For the reasons set forth above, appellants respectfully pray that this Court:

Reverse the order of the District Court granting summary judgment in favor of appellees and enter judgment in favor of appellants, or, in the event that this Court considers that remedy inappropriate, order one or both of the following:

1. That the District Court hold the case pending a determination by an Alaska Court of the Alaska constitutional issues;

2. That the District Court consider the merits of the within action in plenary proceedings.

Dated, Anchorage, Alaska,
November 24, 1969.

Respectfully submitted,

G. KENT EDWARDS,
Attorney General, State of Alaska,

By ROBERT L. HARTIG,
CHARLES K. CRANSTON,
Assistant Attorneys General, State of Alaska,
Attorneys for Appellants.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 185

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; *et al.*,
Appellants,

v.

JOHN BOZANICH, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

APPELLEES' BRIEF

I.

STATEMENT OF THE CASE

Commercial salmon fishing is the "common calling" of a substantial segment of the population of the Pacific Northwest.

The commercial fishing activity in Alaska occurs from the southern tip of the Alaska Gulf near Ketchikan and extends around to the Alaska Peninsula and North to Kotzebue Sound, employing almost 20,000 fishermen and 10,000 other employees in fish processing occupations.

Pages 1 and 13, 1967 *Alaska Commercial Fisheries Statistics,* "Statistical Leaflet No. 15," Alaska Department of Fish and Game.

Commercial fishing in waters adjacent to the shores of the State of Alaska is, since transition under the Alaska Statehood Act of 1958 (72 Stat. 339, §6 (e)) administered and regulated by the Alaska Department of Fish and Game pursuant to the applicable governing Alaska statutes under Title 16. The regulations of the Alaska Department of Fish and Game are promulgated by a quasi-legislative body designated the Alaska Board of Fish and Game, consisting of up to 10 members. A.S.§16.05.220-320. The administration of the Department of Fish and Game is vested in the Commissioner of the Department under A.S. §16.05.010-210.

The waters of Alaska are divided into 11 geographical salmon registration areas for management and regulation purposes, and these areas in turn are divided into districts and subdistricts. The areas are identified by their location as follows: (A-83)

> "(d) Each registration area shall be assigned a code letter. The registration areas are described as follows:
>
> "(1) Salmon registration areas are:
>
> "Code
> Letter
>
> "A—Southeastern Alaska area
>
> "D—Yakutat area
>
> "E—Prince William Sound area, Copper River-Bering River area and the Yakataga district of the Yakutat area
>
> "K—Kodiak area

"L—Chignik area

"M—Alaska Peninsula area and Aleutian Islands area

"T—Bristol Bay area, and after August 1 and before June 15, the Cinder River, Port Heiden and Ilnik sections of the Northern district of the Alaska Peninsula area

"W—Kuskokwim district of the Arctic-Yukon-Kuskokwim area

"X—Kotzebue district of the Arctic-Yukon-Kuskokwim area

"Y—Yukon district of the Arctic-Yukon-Kuskokwim area

"Z—Norton Sound district of the Arctic-Yukon-Kuskokwim area."

The salmon return from the sea at the end of their e cycle of two to six years at approximately the same me and generally in a mass, known as a "run." The runs ay last for only a week or so, as in the case of the great ristol Bay runs of red salmon, or they may occur over period of six to eight weeks, as in the Southeastern ea.

The runs commence in mid-May and early June in e northern portion of the Southeastern area, reach a ak highlighted by the Bristol Bay run during the first o weeks of July and taper off at the end of August in e southern part of the Southeastern area. Chapter 8, *dustrial Fishery Technology*, 1963, Stansby.

The runs, of course, vary in size and specie and vary size in each location from year to year. The size of ese runs can be roughly predicted, although there are equently surprising variations from these predictions.

These predictions will evaluate a run as a "good run" or a "poor run" and the fishing industry plans the extent of its fishing effort accordingly. See page 59 *National Fisherman Yearbook, Issue of* 1969.

In the past, the fisherman could direct his fishing effort to that area of greatest expected fishing success, or even by-pass an entire season if poor fishing was expected, without jeopardizing his right to subsequently return to the areas of his selection in better years.

The manner, location, periods and permissible means of salmon fishery are controlled both by statute and by the regulations of the State Board of Fish and Game. These regulations are adopted annually and are modified from year to year to meet anticipated conditions.

The regulations of the Board are in turn supplemented by "field announcements" which are directives made at the various particular fishing locations, usually during the course of the run, in which adjustments of either extending or limiting the days or hours during which fishing will be permitted are made in direct response to the size of the actual run as it develops. It is the purpose of these regulations to assure a desirable amount of "escapement" (the number of fish who return upstream to spawn) to assure conservation and maintenance of the fishing runs, and yet to accomplish an economic harvest. This has been the historical method of controlling the fishery while still permitting participation by all who wish to follow this occupation. The number who participate is largely determined by the expectations of the season.

There are two principal and two minor means of commercial fishing. With the exception of Bristol Bay, the

nost universal method is known as purse seining. The urse seine vessel is manned by a crew of 3 to 7. The urse seine is strung in a circle, the bottom is then closed r "pursed," and the fish caught within the closed net re "brailed" or unloaded into the fishhold of the vessel.

A second major method of fishing used, almost exclusively in Bristol Bay[1] and to a large extent in other areas, s known as gill netting. The gill netting vessel is smaller nd manned by one or two fishermen. A net is strung rom the vessel in a line across the direction of the fish un, the fish swim into the net and are caught by their gills. The net is then pulled aboard and the fish are extracted.

A less frequently used method is set netting, whereby a net is staked seaward from the beach during low tide, the fish are caught during high tide in the same manner as gill netting, and are removed at the following low tide. This method does not require a vessel. See *Industrial Fishery Technology, supra*; *Salmon, The Living Resource*, pages 20-22.

All of the above methods, accounting for approximately 95 percent of the entire commercial salmon harvest, require a net gear license to be issued to one of the persons operating the net gear, which person must be the owner or lessee of the net. A.S. §16.05.540 and 16.05.670 (A 80-81); "Statistical Leaflet No. 15," page 6, *supra*.

The last general method of commercial fishing is known as trolling. This method involves trailing bated fish lines

1. Although Bristol Bay is only one area, its production represents approximately 25 percent on the average of the entire Alaska canned salmon pack and in 1965 it represented 50 percent of the entire pack. See *National Fisherman Year Book*, Issue 1969, page 67.

from outrigger poles on a vessel and catching the fis with the traditional baited fishhook. Trolling is principall used to catch the coho and king salmon for the fres and frozen market. It is not sufficiently efficient t harvest a larger run during its peak. Trolling cannot b utilized in Bristol Bay because the shallow, turbid wate obscures the lure and because the predominant specie the sockeye or red salmon, will not normally take a lur and hook and must be caught by net. Trolling require a different type of vessel and entirely different equip ment than purse seining or gill netting. See *Industria Fishery Technology,* page 110, *supra; Pacific Northwes Marine Fishes,* Washington State Department of Fisher ies, July, 1967, page 3; "Statistical Leaflet No. 15," pag 6, *supra,* showing no troll caught salmon in the western region, which includes Bristol Bay, Alaska Peninsula and the Arctic-Yukon-Kuskokwim.

The Alaska Commercial Fishing Regulations are entirely different for trolling than for net fishing. Different locations are open for fishing, different times are made applicable and a host of regulations apply to net fishermen alone. In the Southeastern area trolling is permitted during the entire year while net fishing is restricted to very limited dates. See *Alaska Commercial Fishing Regulations, 1969,* 5AAC §909.330 and Sections 33.310 to 33.350.

Every fisherman must purchase each year a *commercial fishing* license, regardless of whether he is fishing with his own gear or for someone else who has the gear. There are so far no restrictions on obtaining commercial fishing licenses (barring personal disqualification for prior violations). A.S. 16.05.480 (A-80)

Each vessel used in commercial fishing must obtain a *vessel license.* There are no restrictions on the issuance of these licenses, assuming the vessel conforms to the law and regulations in size and equipment. 5 AAC 39.120 (A-82)

In addition, a license must be obtained for each unit of *fish net gear,* which license can only be issued to the person actually owning or leasing the gear and operating or assisting in its operation.

On a purse seine vessel, there is a license for the vessel, a commercial fishing license for each of the three to seven fishermen and a gear license for the person owning the net, usually the Captain. Consequently, a person who does not own and have a license for a fishing net must be employed by someone else who does have such a license. In gill netting, one of the two fishermen in each vessel must have a gear license, and of course there must be a gear license for each set net placed on the beach.

The only method of commercial salmon fishing not requiring a net gear license is trolling, but this method in turn requires ownership of a trolling vessel and trolling equipment, or employment by someone who has such a vessel. Some trollers operate alone and others employ a crew of only one or two. Consequently, the employment opportunity is extremely limited. *Salmon, The Living Resource, supra,* page 22 (4,000 troll fishermen in 2,500 boats).

In 1968, the Alaska Fish and Game Board adopted regulations which for the first time would restrict the issuance of net gear licenses in *each area* to those who were previously licensed in *that area.* The proposed regulations

went through several drafts of varying strictness, but the net result was the limitation of licenses to

> (a) Those previously licensed in that area in any one of the years 1965, 1966, or 1967, or
>
> (b) Those who had made a fishing vessel or net investment commitment between April 16, 1967 and December 16, 1967; (A p. 13-15)

with certain additional provisions regarding hardship and other circumstances. It was under these regulations that the plaintiffs were denied gear licenses for the area of their choice in 1968.

In April of 1968, the Alaska legislature enacted Chapter 186, the principal subject matter of these proceedings, which limits eligibility for net gear licenses in *each area* to an applicant who

> "(1) has previously held a salmon net gear license for that specific salmon registration area; or
>
> "(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The provisions of the statute were even more restricted by the proposed 1969 regulations which limited entitlement to a gear license for a specific salmon registration area only to a person who

> "(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or
>
> "(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The effect of the statute and regulations is to freeze all license entitlement in each area to those who have been

fishing in that area for the required duration within the specified years. A fisherman desiring to change areas under these regulations would be compelled to leave his net gear unused for three years and probably his vessel also, while he fished for someone else. The usual distribution of fishing earnings on seine vessels is two shares for the vessel owner, two shares for the net gear owner, and one share for each of the fishermen, including the Master. *Salmon, The Living Resource, supra,* page 22. The fisherman owning the net and vessel would have to sacrifice the earnings on his investment for three years in order to obtain a net license in a different area. The practical effect is to make such change economically unfeasible for any established licensee, even assuming he could obtain employment with another fisherman possessing a net license. The result is the creation of a fishing monopoly in each of the salmon registration areas, with new entry limited to those who accomplish or have accomplished the required number of years of commercial fishing in that area. Although the monopoly created is not complete, it is very substantial.

The same impracticality in qualifying by employment with someone already possessing a gear license in the area would apply equally to qualification through three years of trolling in the new area, even assuming the area was suitable for trolling. The fisherman would have to obtain a trolling vessel, abandon his investment in his fishing nets and his seine or gill net vessel, if he has one, and relinquish his customary method of fishing for a new method.

The statute and regulations, by their text and practical application, would achieve that which was obviously in-

tended—the granting of an exclusive right of fishery in each of the salmon registration areas to those who presently qualify by past licensing or commercial fishing in that particular area for the required duration.

This selective deprivation of the right to fish constitutes a violation of the Equal Protection provision of the Fourteenth Amendment to the United States Constitution. Moreover, this is exactly the sort of privileged treatment which the framers of Alaska's Constitution so clearly intended to prevent when they adopted Article VIII, Sections 3 and 15 of the Alaska Constitution.

II.

SUMMARY OF ARGUMENT

A. The District Court, having jurisdiction both under diversity and the existence of a substantial federal question, properly decided both state and federal issues. Determination of the state law issue was sufficiently clear under the existing constitutional provisions and case authority to render the doctrine of abstention inapplicable. The plaintiffs were entitled to prompt judicial relief.

B. Chapter 186 and the attendant regulations are clearly in conflict with Article VIII, Section 3, "Common Use," and Section 15, "No Exclusive Right of Fishery," of the Alaska Constitution, which incorporates the definition and application of the prohibition of exclusive fishing rights as contained in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 93 L.Ed. 1231, 63 S.Ct. 968 (1948).

C. Chapter 186 and the attendant regulations constitute

an arbitrary, protective and invidious discrimination which unduly favors a certain group of fishermen to the exclusion of other fishermen, and places the control of access into the privileged group in the substantial control of those vested with the privilege, all in violation of the Equal Protection clause of the Fourteenth Amendment. The imposition of onerous and illusory conditions as a prerequisite to qualifying for the fishing privilege renders the invalidity even more clear.

D. The summary judgment was properly granted because the essential factual findings were either admitted in the record and in argument or arose as the necessary conclusion from application of the pertinent fishing laws and regulations. Furthermore, the appellants did not assert a genuine factual issue as required by Rule 5 (H) (2) of the local court rules.

III.

ARGUMENT

A. The District Three-Judge Court Properly Decided Both the State and Federal Issues in Rendering Promptly the Relief Sought by the Plaintiffs

The plaintiffs are all parties adversely affected by the gear license restrictions of Chapter 186 and the proposed regulations. They are all men who have earned their living for many years by commercial fishing.

The plaintiffs are entitled to proceed in Federal Court to obtain a declaration of these rights under both diversity of citizenship (28 U.S.C. §1332) and the existence of a substantial question in the application of the Federal constitution to the State statute (28 U.S.C. §1332(a)).

The rights involved are valued at substantially more than the required $10,000.

The appellants in fact concede the existence of a substantial Federal constitutional question and consequent Federal jurisdiction under 28 U.S.C. §1331(a) (App. Br. p. 41). The main thrust of their argument is that notwithstanding the existence of Federal jurisdiction and a substantial Federal question, the Federal Court should abstain from deciding the case because the provisions of Article VIII, Sections 3 and 15 of the Alaska Constitution are involved. However, appellants do not urge that this court should abstain from considering the State constitutional issues in any event, but only urge abstention in the event this court does not reverse the District Court on the merits in that court's determination that Chapter 186 and the attendant regulations violate both the Fourteenth Amendment of the Federal Constitution and Article VIII, Sections 3 and 15 of the Alaska Constitution. This statement is based upon the concluding prayer of Appellants' Brief at page 52:

CONCLUSION

"For the reasons set forth above, appellants respectfully pray that this court:

"Reverse the order of the District Court granting summary judgment in favor of appellees and enter judgment in favor of appellants, or, in the event that this court considers that remedy inappropriate, order one or both of the following:

"1. That the District Court hold the case pending a determination by an Alaska Court of the Alaska constitutional issues;

"2. That the District Court consider the merits of the within action in plenary proceedings."

We submit that appellants have waived their right to assert the doctrine of Federal abstention by seeking a favorable decision on the merits from this court and urging abstention only in the event that a favorable decision on the merits is denied. Appellants have indicated their willingness to submit the case on the merits if the result is favorable to them, and we urge that this constitutes a conclusive election to be bound by the determination on the merits, whatever the result. *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S. Ct. 328 (1963).

It has been repeatedly held that once jurisdiction in the Federal Court is established, that court has jurisdiction and the obligation to decide all issues raised in the case arising under both State and Federal law. This doctrine is based on the concept that if parties are entitled to proceed in Federal Court, they are entitled to proceed in that court for all purposes, and on the further basic principle that multiple actions and concurrent proceedings over the same subject matter should be avoided. This concept was clearly announced in the case of *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 4 L.Ed.2d 568, 80 S. Ct. 568 (1959). This case involved a California statute prohibiting the importation of avocados containing less than 8 per cent of oil, a condition which could not be met by Florida avocados. Florida attacked the statute as a violation of the commerce and equal protection clauses of the United States Constitution, and also as in conflict with the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69, issued under that Act.

The Supreme Court reversed on the merits, holding at page 80 of 362 U.S.:

> "Cases in this court since *Louisville & N.R. Co. v. Garrett*, 231 U.S. 298, 58 L. Ed. 229, 34 S. Ct. 48 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the statute.[7]" Cases cited.

The case of *Louisville and Nashville Railroad Co. v. Garrett*, 231 U.S. 298 (1912), is particularly applicable to the present case because in the *Garrett* case, the court held at page 304:

> "The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising *under the state constitution* and statutes were therefore before the Circuit Court and the appeal brings them here. They may be first considered." (Emphasis supplied)

The court then specifically considered the constitutionality of a rate making statute under the Kentucky constitution, noting the court's reluctance to hold originally a statute unconstitutional under a state constitution "unless the case imperatively demands such a decision."

he reluctance, shared with the state courts, was not a eluctance to consider the issue but the usual reluctance o hold constitutionally invalid an act of the state's legis- ature.

The *Garrett* case in turn cited *Michigan Central Rail- oad v. Powers*, 201 U.S. 245 (1906), in which the court eld at page 291:

> "Undoubtedly a Federal court has the jurisdiction, and when the question is properly presented it may often become its duty to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the Federal Constitution, may be presented in a single suit and call for consideration and determination."

Typical of other cases confirming the right and duty of he federal three-judge court to pass on all issues, includ- ing local issues, are *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 82 L.Ed. 319 (1938), holding that all issues in a rate case could be con- sidered, including whether the Commission's order was authorized by the state law; *United States v. Georgia Public Service Commission*, 371 U.S. 285, 9 L.Ed.2d 317, 83 S. Ct. 397 (1963), holding that once a three-judge court is convened, the case can be disposed of below or on appeal *on any ground*, whether or not it would have justified the calling of a three-judge court initially (head- noted 3); *Sigma Chi Fraternity v. Regents of University of Colorado*, 258 F. Supp. 515 [4] (1966), involving abolishment of discriminatory fraternities; and *Ness Prod- uce Co. v. Short*, 263 F. Supp. 586 (1966), holding un- constitutional an act requiring special labeling of im-

ported meat. All of these cases cite or follow either *Florida Lime & Avocado Growers, supra,* or *Railroad Commission of California, supra. Florida Lime & Avocado Growers* has most recently been cited and followed for this general proposition of consideration of all issues in *Flast v. Cohen,* 392 U.S. 83 (1968), 20 L.Ed.2d 947, 88 S. Ct. 1942 under [4-6].

Consistent with the aforequoted authorities establishing that the court may properly pass on all issues in which a substantial constitutional question is presented, the three-judge District Court in the case of *Brown v. Anderson,* 202 F. Supp. 96 (1962), held that Chapter 62 of the Alaska Session Laws of 1961, granting authority to the Alaska Board of Fish and Game to restrict commercial fishing of non-residents under certain circumstances, was unconstitutional under Article I, Section 8, Clause 3 of the Federal Constitution and also violated Article I, Sections 1 and 7 of the Alaska Constitution.

The law appears to be clearly settled that where both a Federal and a State constitutional or statutory issue are involved, a litigant must commence his action in Federal Court if he is to obtain an initial Federal Court ruling on the Federal issue. Stated conversely, if he commences his action in State Court, both State and Federal issues are presented and the only review of Federal issues by a Federal Court would be through such appellate review as might be available to the United States Supreme Court. The State Court determination has been held to be *res judicata* on both the State and the Federal issue even where the parties sought to reserve the Federal issue. See *Wilke & Holzheiser, Inc. v. Reimel,* 266 F. Supp. 168 (1967, Calif.) in which the court observed at page 169:

"Throughout this state appellate proceeding plaintiff has taken the position that it has relied on the provisions of the *Constitution of the State of California* and that it was reserving its challenges under the Federal Constitution for disposition in the United States District Court." (Emphasis supplied)

and the court went on to state its understanding of the abstention doctrine as follows at page 171:

"[4, 5] Plaintiff argues that is would have been an idle act for it to have come to the District Court before proceeding in the State courts because the District Court would have invoked the abstention doctrine and sent plaintiff back to the State courts for determination of the State issues before returning to this Court. However, the exercise by a District Court of the abstention doctrine is not automatic nor can it always be assumed. *Doud v. Hodge*, 350 U.S. 485, 76 S. Ct. 491, 100 L.Ed. 577 (1965); *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, 80 S. Ct. 568, 4 L.Ed.2d 568 (1960); *Telephone News System, Inc., v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), aff'd, 376 U.S. 782, 84 S. Ct. 1134, 12 L.Ed.2d 83 (1964). The doctrine of abstention is an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it. It involves a discretionary exercise of the court's equity powers and is generally not invoked, except under special circumstances. (Cases cited) Plaintiff cannot escape the *res judicata* effect of the state proceedings by speculation as to what this court might have done if plaintiff had come here in the first place."

The same result was reached by the United States Supreme Court as will be later discussed.

It follows therefore that the "abstention" doctrine of Federal Courts referring State issues under certain circumstances to State Courts, as announced in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), will necessarily involve ex-

tended and concurrent proceedings, the possibility that the State action may not be entertained by State Courts while the Federal case is pending, and the deprivation of the plaintiffs' right in a diversity case to have all issues decided by a Federal Court.

The problems of abstention were extensively considered, particularly in Justice Douglas' dissenting opinion, in the case of *England v. Louisiana Medical Examiners,* 375 U.S. 411, 11 L.Ed.2d 440, 84 S. Ct. 461 (1964), in which rules were announced to preserve entitlement to Federal adjudication while proceeding in State Court pursuant to an abstention remand. It obviously involves substantial duplication of effort, expense and attendant delay, and it places the courts in a position of almost competing with each other in making an ultimate disposition. The importance of the fact finding function at the trial court level is complicated where there exists the possibility of conflict between the facts as found by the State on the State issues as compared to the facts which might ultimately be found by the Federal Court on the Federal issues. There may be circumstances where these disadvantages must be endured to obtain a definitive State determination of uncertain State law. We submit that the present case is not such a case.

The balancing of these interests is discussed in *Meredith v. Winter Haven,* 320 U. S. 228, 88 L. Ed. 9, 64 S. Ct. 7 (1943), involving an application for equitable relief against the City of Winter Haven, Florida's proposed bond recall without payment of deferred interest. Jurisdiction was based on diversity only. The Florida law was uncertain on the issue and the Court of Appeals

smissed on the ground that plaintiffs should proceed State Court.

The United States Supreme Court reversed, and ated at page 234 of U.S.:

"But we are of the opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

"The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its nonexercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 618, 80 L. Ed. 920, 924, 56 S. Ct. 600; *Risty v. Chicago, R.I. & P.R. Co.*, 270 U.S. 378, 387, 70 L. Ed. 641, 650, 46 S. Ct. 236; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234, 235, 67 L. Ed. 226, 232, 43 S. Ct. 79, 24 A.L.R. 1077; *McClellan v. Carland*, 217 U.S. 268, 281, 282, 54 L. Ed. 762, 767, 30 S. Ct. 501. When such *exceptional circumstances* are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by *the highest court of the state, would thwart the purpose of the jurisdictional act." (Emphasis supplied)

*[235]

The "exceptional circumstances" are listed in the

opinion as having been found in cases involving crimin prosecution, collection of taxes or fiscal affairs of th State, the State's administrative rate making functio for public utilities, liquidation of a State bank and th domestic policy of the State in providing for review o the reasonableness of its administrative agencies' factu determinations. *Burford v. Sun Oil Co.*, 319 U.S. 31 87 L. Ed. 1424, 63 S. Ct. 1098 (1943).

Most of the cases involve the State's regulatory authorit over parties who are enjoying a special and protecte privilege from the State, such as a common carrier' exclusive franchise certificate which is received in ex change for submission to rate regulations. Althoug the oil drilling cases, such as *Burford v. Sun Oil Co supra*, are not strictly franchise cases, they are very clos because of the blanket limitation and control which ha historically been applicable to oil production to preven draining and to balance the interest of adjacent propert owners. The granting of a right to drill an oil well and it location is essentially equivalent to granting a franchis because such permit must be determined with specifi reference to its effect on existing wills and the geologica condition applicable to that well. The regulations an State appellate procedures are unique in the wide scop given to judicial review. *Burford v. Sun Oil Co., supra*

It is true that the permissible means, locations an times for commercial fishing have been historically con trolled by uniformly applied State law and administrativ regulation in the interest of conservation and maximum sustained yield, but such controls have never, at least to significant and continuous extent, taken the form o franchises or exclusive fishing privileges to particula

persons or groups. Where this has been attempted on the basis of residency, it has been struck down under the equal privileges and immunities clause of the United States Constitution, *Toomer v. Witsell*, 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948), and *Brown v. Anderson*, 202 F. Supp. 96 (1962, D.C. Alaska). However, the same policy would apply to intrastate privileges and is carried into Article VIII, Sections 3 and 15 of the Alaska Constitution.

The importance of protecting this historic common calling raises issues which are far beyond the scope of the special regulatory authority of the State and its agencies. Under these circumstances, the rights of the parties plaintiff for themselves and for others similarly situated reach an importance which fully offsets the Federal-State harmony sought to be achieved by abstention.

There is no case pending in the Alaska State Courts involving these same issues, and plaintiffs could obtain a State decision only by commencing such an action and processing it through the Alaska Supreme Court in accordance with the procedures of *England v. Louisiana Board of Medical Examiners, supra*, and then returning to the Federal Court in the unlikely event that the State Court's decision would be different on the State issue than that announced by the court below.

A stronger argument in favor of this procedure might be made if there was an area of genuine uncertainty and ambiguity in the provisions of the Alaska Constitution, particularly Article VIII, Section 15, as it applied to Chapter 186. As the court below stated at page 304 of 297 F. Supp.:

"Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable. See the analysis of authorities in *Zwickler v. Koota*, 389 U.S. 241, 250-251, 88 S. Ct. 391, 19 L.Ed.2d 444 (1967). In *Zwickler*, the Supreme Court stated, 'We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' [Citations omitted.] 389 U.S. at 251, n. 14, 88 S.Ct. at 397."

The following are other cases which have emphasized the uncertainty of the State law as one of the necessary conditions which must exist to create the "special circumstances" for abstention.

Chicago v. Atchison, Topeka & Santa Fe Railway Company, 357 U.S. 77, 2 L.Ed.2d 1174, 78 S. Ct. 1963 (1958), involved the constitutionality of an attempt by Chicago to require licensing of a transfer system between railroad stations. The court denied the contention that the case should be remanded to obtain a State interpretation of the licensing regulations. The court stated at page 84 of U.S.:

"We see no ambiguity in the section which calls for interpretation by the state courts."

Although *Harrison v. N.A.A.C.P.*, 360, U.S. 167, 3 L.Ed.2d 1152, 79 S. Ct. 1025 (1959), applied abstention with the following observation at page 176 of U.S.:

"In the service of this doctrine, which this court has applied in many different contexts, no principle has found more consistent or clear expression than

that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

The court then stated in *N.A.A.C.P. v. Bennett*, 360 U.S. 471, 3 L.Ed.2d 1375, 79 S. Ct. 1192 (1959) that reference of a State statute to State Court "should not automatically be made," referring to *Harrison v. N.A.A.C.P., supra,* and clearly indicating that remand to a State Court should only occur where there is an ambiguity or uncertainty calling for interpretation.

This was confirmed in *Harman v. Forssenius*, 380 U.S. 528, 14 L.Ed.2d 50, 85 S. Ct. 1177 (1965) in which the court stated at page 534 of U.S.:

> "The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain."

Appellants, at page 46 of their brief, cite *City of Meridian v. Southern Bell Telephone & Telegraph Company*, 358 U.S. 639, 3 L.Ed.2d 562, 79 S. Ct. 455 (1959), as applying abstention under circumstances almost identical to the present case. It affirmatively appears in that case that the plaintiffs contended that the statute was not applicable to them, and the Supreme Court further noted at page 358 of U.S.:

> "Here, the state law problems are delicate ones, the resolution of which is not without *substantial difficulty*—certainly for a Federal Court."

Far from being identical with the present case, *Meridian* is another example of cases applying abstention where the State law was uncertain.

The appellants seek to avoid the language of *Zwickler*

v. Koota, supra, and cases reaching a similar result by categorizing them as "civil liberties" cases (App. Br. p. 47).

This is a selective narrowing which appears neither from the cases or the court's language. But even if true, what more important "civil liberty" is there than the right to follow one's historic occupation? Isn't the limitation of that right, even for the several years of judicial review, an example of the impermissible chilling of the very constitutional rights they seek to protect? *Zwickler v. Koota,* 389 U.S. 241, 19 L.Ed.2d 444, 88 S. Ct. 391 (1967).

Appellants argue that Article VIII, Section 15 of the Alaska Constitution has never, "as such," been interpreted by any court (App. Br. p. 43), in apparent recognition of the fact that abstention is not applicable where the legal issue has been decided by the ultimate Appellate Court. *Turner v. Memphis,* 369 U.S. 350, 7 L. Ed.2d 762, 82 S. Ct. 805 (1962).

As is more fully set forth later in this brief under Argument B, Section 15 was intentionally adopted almost verbatim from Section 1 of the White Act after that portion of Section 1 relating to the prohibition of an exclusive right of fishery had been extensively construed in *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 93 L. Ed 1231, 63 S. Ct. 968 (1948).

The United States Supreme Court was at that time not only the Supreme Federal Court but also the Supreme Appellate Court on all issues from the then Territory of Alaska, where the Federal Court System served in the

dual capacity as the Territorial Court of general jurisdiction.

The "no exclusive fisheries" portion of §1 of the White Act was in effect a portion of the Territorial Constitition, and when interpreted by the Supreme Court in the *Hynes* case as prohibiting the granting of special fishing privileges, became the fixed law on that issue. This is particularly true where the White Act provision, as so interpreted, was consciously and deliberately carried into the Alaska Constitution in the form of Article VIII, Section 15.

We submit that with the clarity of the prohibition against exclusive licensing and the entitlement of these appellees to as prompt a decision as is possible to protect the liberty of their lifelong occupation, the doctrine of abstention and remand to State Court should not be applied.

B. Chapter 186 and Regulations Are Clearly in Conflict With Article VIII, Sections 3 and 15 of the Alaska Constitution

Prior to the adoption of the White Act in 1926, 44 Stat. 752, 48 U.S.C. §221, the administration of the Alaska fisheries by the Federal government permitted the practice by administrative order of limiting fishing rights to prior licensees. The right to do so was not judicially tested so far as we can ascertain.

The White Act was a comprehensive piece of legislation to generally provide for and update the management of the Alaskan fishery. A provision in §1 of that Act contained a specific prohibition of the prior practice of restricting fishing privileges in the following language:

"*Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and *that no exclusive or several right of fishery shall be granted therein*, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce." (Emphasis supplied)

In 1946, the Secretary of Interior (successor to the Secretary of Commerce in the administration of the Alaska fishery during territorial days), sought to close certain waters off Kodiak Island for fishing to all but members of the Karluk Indian reservation and their licensees.

The regulation was challenged by those excluded from the fishery and reached the United States Supreme Court in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), 93 L. Ed. 1231, 63 S. Ct. 968.

The precise language of the fishing regulation is set forth at pages 91 and 92 of U.S.:

"On March 21 and August 27, 1946, the Secretary of the Interior amended the Alaska Fisheries General

*[92]

Regulations, *50 CFR 1946 Supp., §208.23, that related to the commercial fishing for salmon in the Kodiak Area Fisheries by the addition of a subsection (r), reading as follows:

"'(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32′ 30″ N., thence northeasterly along said shore to a point 57° 39′ 40″.'

"The foregoing prohibition shall *not apply to fishing by natives* in possession of said reservation, nor

to *fishing by other persons* under authority granted by said natives (49 Stat. 1250, 48 U.S.C.A 358a). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior of his duly authorized representative." 11 Fed. Reg. 3105, 9528." (Emphasis supplied)

The pertinent portion of the court's analysis in the *Hynes* case, with particular reference to the purpose of the "no exclusive or several right of fishery" provision of the White Act, is set forth as follows at page 118 of U.S.:

"The validity of the exception permitting fishing by natives in possession of the reservation and their licensees is challenged by respondents because of a proviso in §1 of the White Act, reading:

"'Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commmerce. . . .'

"Respondents alleged that the exception for fishing by natives and their licensees made §208.23 (r) wholly illegal because it was inconsistent with the proviso of §1 of the White Act as to exclusive or several right of fishery. We have no doubt, however, that the White Act authorizes the establishment of White Act preserves or *closed areas in reservations

*[119]

created, as the Karluk Reservation, under §2 of the Act extending the Wheeler-Howard Act to Alaska. No implications can be drawn from the broad and clear language of the White Act that reservation waters, however valuable for fishing or fish propagation, must be left unprotected from ruthless exploitation.

"What we have said heretofore in this opinion as to the importance of fisheries and their conservation to Alaska natives with reference to the Karluk River area in particular need not be repeated. The quoted section of the White Act gives power to the Secretary so that he may '(c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable.' *Then follows the proviso that every such regulation shall be of general application and that no exclusive or several right of fishing shall be granted therein. This section was enacted to correct alleged abuses that arose in the administration of the Act* 'For the protection and regulation of the fisheries of Alaska,' approved June 26, 1906, 34 Stat. 478, c 3547. By §6 of the earlier act, streams or lakes could be set aside as permanent preserves but not coastal waters. Although the 1906 Act did not delegate regulatory powers in the amplitude of the White Act, fishing reservations in territorial waters were created by Executive Order and regulations were issued thereunder.[47] *The policy behind these regulations and their administration was to restrict the right to fish commercially to those who had formerly fished in these areas.* See Fisheries Service

*[120]

Bulletin No. *92, Jan. 2, 1923. Congress did not propose that these rich fishing grounds should be monopolized by this defined group. *The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.*[48] The enforcement provisions of the White Act gave stern warning to prospective violators.[49]"

The court observed, as appellants quote on page 39 of their brief, that the waters of Alaska are so vast and the local conditions so varied that it is impossible to prescribe by legislation all necessary provisions and therefore broad powers and wide discretion must be given to the administrative branch. However, the very essence of the

ies case is that notwithstanding its recognition of the essity for this regulatory authority on such a broad pe, it cannot be utilized to conflict with the mandate hibiting special fishing privileges. The court goes on tate at page 122 of U.S.:

"As §208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon §1 of the White Act, we think it clear that its proviso, 'that no exclusive or several right of fishery shall be granted therein,' applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. It seems also clear to us that the adoption of a corporate charter and a constitution by the Native Village of Karluk under §§16 and 17 of the Wheeler-Howard Act, discussed at pp. 1248, 1249, *supra*, can add nothing to the power of the Secretary under the White Act.

"'*Exclusive,' as used in §1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people.* The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in §1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations. The White Act fishing preserves were not intended to furnish a monopoly to a favored few. Whatever may be the powers of the Department of the Interior or the natives as to regulating the entrance of persons other than natives in possession of Karluk Reservation into or on the area of land and water in that reservation,[52] they are not broad *enough to allow

> the use of the White Act sanctions to protect the reservation against trespass. White Act sanctions are for White Act violations. . . . The Department of the Interior by §208.23 (r) has decided upon the conservation of fisheries in the described waters of the Karluk Reservation in accordance with the White Act with an exception in favor of the natives that seems to rest on the fact that the natives are on a reservation that includes the White Act conservation area. This cannot be done. The welfare of the 57 electors of Karluk Reservation and their families is important. The Secretary of the Interior, however, cannot give them such preferences as are here given under the authority of the White Act. Other American citizens are equally entitled to the benefits from White Act preserves.[53] [Headnote 21] We hold that the regulation §208.23 (r) is void as a whole because it violates the proviso of the White Act. See p. 1239." (Emphasis supplied)

We have therefore a comprehensive consideration of all of the arguments urged by appellants as to the scope of the regulatory power and the reasonableness of the provisions of the limitations as exemplified by the terms of Chapter 186, and these arguments are given even more impact when applied as in the *Hynes* case to the granting of such exclusive rights in the waters of an Indian reservation which the court finds was validly created. Notwithstanding the recognition of these arguments under those circumstances, the *Hynes* case held that they must yield to the clear mandate of the §1 proviso.

With the full knowledge and awareness not only of this judicial history but the entire situation of the Alaska fishing industry which may reasonably be imputed to the framers of the Alaska Constitution, their deliberate adoption and incorporation of the White Act proviso as interpreted by the *Hynes* case constitutes such a con-

clusive prohibition against the restrictive licensing scheme of Chapter 186 as to preclude any scintilla of a question on the issue.

In proposing Section 15 of the Alaska Constitution, the Natural Resources Committee of the Constitutional Convention made the following commentary:

> "Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. (Emphasis added) 'Commentary on Article on State Lands and Natural Resources,' January 16, 1956, p. 9"

The Attorney General of the State of Alaska in his Opinion of February 8, 1968 holding invalid the proposed 1968 regulations limiting licenses to prior licensees, expressly recognized that Section 15 was adopted to prohibit exactly this type of privilege. He stated at page 43 of the Appendix:

> "In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery."

Although the Attorney General subsequently on February 16, 1968 approved the revised 1968 regulations (A. p. 52), as contained in §102.09 (A. p. 13 *et seq.*) which also limited licensees to those holding a prior license or who had made certain described investments,

the Attorney General in the Opinion of February 16 did not attempt to explain or rationalize the change in position (A. p. 52). We again urge as the court below observes (A. p. 75):

> "There is no saving difference between the present licensing scheme and that to which the Attorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable by the framers of Alaska's Constitition."

We submit the same result flows from the application of Article VIII, Section 3:

> "*Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

It would be difficult to frame language which would more clearly prohibit restricting the right of fishing as between different persons than the language contained in Sections 3 and 15. There is no question that reasonable restrictions of gear, waters, seasons, species and similar factors may be adopted which apply equally to all persons. The law under attack, however, permits some to fish commercially where others are prohibited. This is a restriction of "common use" and a grant of an "exclusive right" and "special privilege" of fishing by definition.

Webster's Unabridged Dictionary, 1950 ed., defines "common" as:

> "1(a) belonging or pertaining to the community at large, either as a social group or as a political organization; public; subject to rights of common use; as, the common pasture, the common good; railroads are common carriers.
>
> "2. shared equally or similarly by two or more individuals or species or by all the members of a group or kind."

Bouvier's Law Dictionary, 1940 ed., defines "common fishery" as a "fishery to which all persons have a right."

It makes no difference in granting a special privilege of fishery whether the number included greatly exceeds the number excluded. A 1 to 1,000 ratio of denials to license grants is still the grant of an exclusive fishery to all but the one, and a denial of common fishery to the one. Further, if the authority exists to select all but one out of a thousand for fishing privileges, then the authority exists to select one out of two, and then to select only one out of a thousand to receive such permission.

The appellants seek to avoid the impact of the plain language of Article VIII, Section 15 and the judicial and constitutional history behind it by urging that the present statute and regulations:

> ". . . creates a much broader class than the regulation disapproved by the Attorney General." (App. Br. p. 37)

It seems manifestly clear that merely enlarging the number who are included within the class to whom the fishing privilege is extended in no manner changes the fact that such an exclusive right is being given. It is exclusive as to those who have the privilege by excluding any persons who had not previously fished in the area.

The fact that a person might qualify for a gear license at a later time by fishing for someone else for three years cannot save the statute. It still remains that for any given season, those applicants are excluded from themselves fishing with nets who have not had a prior license or prior fishing employment in that area.

We believe we have earlier demonstrated in the factual

statement the illusory nature of the so-called provision for new entry. A fisherman owning his own net and vessel could ill afford to abandon his investment for three years of employment by another fisherman holding a net license, assuming such employment could in fact be obtained.

This is especially true of the gill net fishing in the important Bristol Bay area, where there are some single fishermen and at most one fisherman on each vessel in addition to the fisherman having the net gear license. The fisherman with the gear license controls employment and could readily exclude new entrants under the statutory scheme.

The alternative of fishing by trolling does not exist in Bristol Bay and other Western areas. Where it does exist, it still furnishes no practical alternative to the net gear fishermen. The fisherman with net gear and a net gear vessel would not only have to abandon this equipment for the required three years, and but would also have to invest in a trolling vessel and gear or attempt to obtain the limited employment on someone else's troller. No fisherman could afford such an alternative.

Appellants seek to sustain the statute as a safety measure (App. Br. p. 38). It need only be said that conceding the right of the state to provide for safety as well as conservation in the fishing industry, this right must nevertheless be exercised in a manner which does not conflict with the mandate of equally controlling provisions such as the constitutional provisions of Sections 3 and 15. Otherwise, any constitutional provision could be avoided by seeking to justify its disregard through the

exercise of a collateral authority. This was precisely the issue involved in the *Hynes* case, wherein the court recognized the right to create the Indian reservation and adopt regulations relating thereto, but not regulations which conflicted with the common fishery proviso of §1 of the White Act.

We submit that the arguments by appellants are thinly veiled disguises or camouflages for what is manifestly an enactment intended to artificially improve the economic prospects of the fishermen in each area by granting them an effective monopoly and sharply restricting the influx of new fishermen or fishermen from different areas. This results in the Balkanization of the Alaska fishing effort and a serious impeding of the flexibility essential to the industry. Under the present statutory scheme, a single unlicensed fisherman could not even place his small set net on a beach, even though the handling and navigation of a vessel was not in any manner involved.

The true purpose of the enactment is even more apparent when reviewed in its historical context. There have been a number of prior attempts by the Alaska Legislature to create such favored positions. See *Freeman v. Smith*, 44 F.2d 703 (1930), certiorari denied; *Smith v. Freeman*, 282 U.S. 907 ($250.00 license fee for non-resident fisherman against $1.00 fee for resident); *Mullaney v. Anderson*, 13 Alaska 574, 342 U.S. 415, 96 L. Ed. 458, 72 S. Ct. 428 (1952) ($50.00 non-resident license fee to $5.00 resident fee). *Brown v. Anderson, supra* (restricting fishing to residents of particular areas under alleged hardship circumstances), *Tyree, et al. v. Edwards, et al.*, 237 Fed. Supp. 589, affirmed *Alaska v. International Union of Operating Engineers, Local* 302,

393 U.S. 405, 21 L.Ed.2d 633, 89 S. Ct. 684, rehearing denied, 393 U.S. 1112 (1969).

Moreover, appellants' answers to interrogatories propounded by appellees indicate a total absence of any factual basis for contentions that lack of experience on the part of fishermen is related in any manner to management enforcement and public safety problems (A-p. 53-57). None of the defendants, consisting of a commissioner of fishing game and the members of the Fishing Game Board could cite a single example indicating such a relationship.

If safety in operation and obedience to regulations were in fact the compelling purpose to be served by the legislation, then such purpose could easily be satisfied by requirements consistent with the constitutional provisions, including means of demonstrating familiarity with conditions and regulations to be encountered, or provision for having a person so familiar as a member of the crew.

C. Chapter 186 and Attendant Regulations Are In Violation of the Fourteenth Amendment of the United States Constitution

In the court below, appellees urged that Chapter 186 and the attendant regulations violated Article I, Section 8, Clause 3, (the Commerce clause) and the Fourteenth Amendment, Section 1 (the Equal Protection provision) of the United States Constitution and also violated the comparable provisions of the Alaska Constitution. The District Court sustained the contention as to the Fourteenth Amendment and did not reach the other issues.

The Attorney General in his opinion of February 9,

1968, recognized that these clauses, and particularly the Fourteenth Amendment, invalidated the proposed 1968 regulation, which would have limited licenses to prior licensed holders, and found such provisions unconstitutional on these grounds as well as under Section 15 of the Alaska Constitution (A-P 38-41).

In reaching this decision, the Attorney General referred to the case which is still most closely in point of all relevant decisions, *State ex. rel. Bacich v. Huse*, 187 Wash. 75 (1936), 59 P.2d 1101.

This case is particularly strong authority, coming from a sister Northwest state with a similar vital interest in and concern for its salmon industry.

The State of Washington does not have a constitutional provision equivalent to Article VIII, Section 3 "Common Use" and Section 15 "No Exclusive Right of Fishery" provisions in the Alaska Constitution.

As reported in the Attorney General's opinion, the Washington Supreme Court held unconstitutional under Article, I, Section 12 of the Washington Constitution and under the Fourteenth Amendment of the United States Constitution the restriction of gill net licenses to holders which had such licenses in 1932 and 1933. Pertinent portions of the opinion are as follows:

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> "[2] The aim and purpose of the special privileges and immunities provision of Art. I, s 12, of the state constitution and of the equal protection clause of the Fourteenth Amendment of the Federal constitution is to secure equality of treatment of all persons, with-

out undue favor on the one hand or hostile discrim
nation on the other.

"To comply with these constitutional provision
legislation involving classifications must meet an
satisfy two requirements: (1) The legislation mu
apply alike to all persons within the designated clas
and (2) reasonable ground must exist for making
distinction between those who fall within the cla
and those who do not."

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" [3] . . . The question then remains whether ther
is any reasonable basis for distinction between per
sons who held licenses in either of those years an
persons who did not. In our opinion, there is no rea
sonable basis for such distinction. We are of the be
lief that the classification is not predicated on an
fair, just, or natural basis of selection, but is wholl
arbitrary and capricious."

The court in its opinion draws a simile to limiting th
use of highways to drivers holding licenses in particula
years only.

The only significant difference between the Washing
ton statute and Chapter 186 is that Chapter 186 provide
for obtaining a gear license after three years commercia
fishing in the particular area. This factor cannot sav
the statute, particularly since in actual application i
places the right to control entry into the area and t
qualify for a license in the hands of the very persons wh
have obtained the special privilege of being licensed, an
in whose interest it would be to enhance the value o
the right by restriction. The statute provides no alterna
tive or objective method of establishing qualification. A
we previously observed, an applicant could not obtai
the three years' experience unless he could obtain em

ployment from someone who did have a license, or unless he buys and operates a trolling vessel for three years.

Furthermore, the limitation to a particular area is a clearly arbitrary grant of a special privilege for a particular location. The salmon runs vary from season to season and the very flexibility and desirable diversion of fishing effort from poor areas to good ones which is consistent with good fishery management is prohibited by this statute. Should a boat and seine owner in Southeastern have to work three years for someone else in order to fish an adjacent area? Must a fisherman select an area at his peril and have to sacrifice ten percent of his probable working life to utilize his gear in a different area?

It is fundamental to American constitutional law and under the protection of the Fourteenth Amendment that every person has the right to follow a general occupation or calling free from arbitrary, discriminatory and unreasonable restrictions. Justice Field stated at page 757 in a concurring opinion in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1883), in which a livestock butchering monopoly was defeated:

> "Among these inalienable rights, as proclaimed in that great document[2], is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment.
>
> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same condi-

> tions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

The equivalent statement in the same case was made in a concurring opinion by Justice Bradley, who stated at page 762:

> "The right to follow any of the common occupations of life is an inalienable right; . . To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right,but, as I think, to the express words of the Constitution."

This specific statement was cited with approval in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), at page 587.

Other cases proclaiming the same fundamental right include *Dent v. West Virginia*, 129 U.S. 114 (1888); *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S. Ct. 1064 (1886); *Truax v. Raich*, 239 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7, (1915); *Adams v. Tanner*, 244 U.S. 590, 61 L.Ed. 1336, 37 S. Ct. 662 (1917); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 92 L.Ed. 1478, 68 S. Ct. 1138, (1948); *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S. Ct. 1400 (1955); and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S. Ct. 752, (1957).

The appellants cite *McGowan v. Maryland*, 366 U.S. 420 as permitting statutory discrimination under the Fourteenth Amendment: (App. Br. p. 18)

> ". . . if any state of facts reasonably may be conceived to justify it."

The language in cases must be measured against the actual situations involved, and while the criteria announced in the *McGowan* case was considered sufficient to dispose of the incidental sale of amusement articles as related to a Sunday closing law, certainly further considerations are involved in legislation which would exclude citizens from engaging in an important economic endeavor which has been historically open to those who chose to live by the harvest of the sea.

Assuming that limiting the number of fishermen would decrease the fishing effort, this same result can be achieved with far greater flexibility and response to actual conditions by restricting the time and method of fishing without creating a "closed shop" of fishermen in the process. At least where the same result can be achieved by a method which does not infringe on generally accepted rights and freedoms to pursue common callings, such results cannot be achieved by methods which do so infringe.

The appellants attempt to sustain this legislation, which represents a drastic innovation on a historically open occupation, by suggesting at page 24 of their brief a set of circumstances involving pure conjecture as to the "conceived" effects of the so-called lack of experience in each area. The agency charged with the responsibility of administration, regulation and enforcement (the appellants) have compiled no statistics or comparable information with which to support the legislative recitals under Chapter 186 that unrestricted gear licensing has posed additional management, enforcement and public safety problems through:

> ". . . lack of familiarity with regulations, waters, and procedures peculiar to the individual area." (See appellees' interrogatories and appellants' answers to interrogatories at pages 53 through 57 of the Appendix)

If appellants had any supporting factual study relating to the information requested, even though not exactly in the same form as requested, it was their duty under Federal Rule No. 33 to:

> ". . . furnish such information as is available."

It is apparent from the answers to the interrogatories that the statutory recitations were mere window dressing for the real statutory purpose of creating a privileged group of present licensees as relates to net gear fishing.

Appellants argue at page 30 of their brief that the legislature may have had knowledge that the appellants, as the administrative body charged with management, regulation and enforcement of the fishing industry, did not have. This assertion strains credulity and renders all the more objectionable the adoption by the appellants of Section 102.09 of the 1969 regulations which are even more stringent in limiting entitlement to net gear licenses than the provisions of Chapter 186.

Can the legislature find that the issuance of licenses to fishermen who have not previously fished in that area has posed additional management and enforcement problems for the department charged with the management and enforcement responsibilities, where that department does not have information which would sustain any such finding? The following interrogatory answer of appellants is typical in establishing the lack of genuine foundation for the legislative recitals: (A. p. 56)

"Defendants state further that there is no information readily available describing specific incidents wherein additional management problems were caused by licensees with a total lack of experience who fished a particular area."

At least these circumstances would subject the legislation to the closest scrutiny and the "careful consideration" observed in *Morey v. Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S. Ct. 1344 (1957).

Assuming without admitting that the legislature could have conceived (1) that the accumulation of gear threatened the salmon resource and (2) that there is a correlation between the amount of net gear and the harvest, and (3) that there were many inexperienced applicants, may the legislature meet these "conceived" problems by restricting entry in such a manner that it results in virtual exclusion for all but present licensees and those who are able to obtain employment from present licensees, as to *each area*?

The statute and regulations in this case are not only so rigid and mechanical as to render them entirely inappropriate as a means of fishing management, but they also result in the "invidious discrimination" prohibited by the Fourteenth Amendment. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 99 L.Ed. 563, 75 S. Ct. 461 (1955); *Morey v. Doud, supra,* and by the court below in the following portions of its opinion (App. p. 71):

"Although a state may enact fishing regulations in the legitimate interests of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the

state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

"We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud*, [4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

"In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:

> " 'The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest

careful consideration to determine whether they are obnoxious to the constitutional provision." [Citations omitted.]

"354 U.S. at 463-64, citing other controlling authorities; see *Mayhue v. City of Plantation*, 375 F.2d 447, 450-51 (5th Cir., 1967); *cf Levy v. Louisiana*, 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L.Ed.2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless, we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary 'prior experience' in the industry in the hands of private citizens now eligible for the required license. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the 'experience' necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life."

Appellants urge with reference to this finding that the ourt assumed facts not established (App. Br. p. 48), et the conclusion follows necessarily from the gear licens-ng provisions, which leave as the only alternative, s observed by the court below, fishing for other types f fish or trolling (the latter method admittedly being less fficient, involving an entirely different method, and not eing useable in some areas).

Under the statute, we have the anomalous situation of a halibut fisherman for three past years in that area being entitled to a net gear license, but an experienced salmon purse seiner from an adjoining area being excluded.

We believe the facts in the present case are in sharp contrast with those relating to family preferences in apprentice applicants as Mississippi Delta pilots in *Kotch v. Board of River Pilots Commissioners for the Port of New Orleans*, 330 U.S. 552 (1947), relied upon so heavily by appellants (pp. 26 and 27 of their brief).

As the court observed in *Kotch*, at page 557 of U.S.:

> "And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. *Taylor v. Beckham*, 178 U.S. 548, 44 L. Ed. 1187, 20 S. Ct. 890, 1009; *Snowden v. Hughes*, 321 U.S. 1, 11-13, 88 L. Ed. 497, 504, 505, 64 S. Ct. 397.
>
> "Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such."

We are dealing in the present case with a common calling dating from the dawn of man, not involving the holding out of a highly specialized skill on which others must place complete reliance and surrender for the time the navigation of their vessels.

The court observed at page 560:

> "Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage.[22]
>
> • • •
>
> "The number of people, as a practical matter, who

can be pilots is very limited. No matter what system of selection is adopted, all but the few occasionally selected must of necessity be excluded. Cf. *Olsen v. Smith, supra,* (195 U.S. 344, 345, 49 L. Ed. 230, 25 S. Ct. 52).[27]...

"We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments. It is enough here that considering the entirely unique institution of pilotage in the light of its history in Louisiana, we cannot say that the practice appellants attack is the kind of discrimination which violates the equal protection clause of the Fourteenth Amendment."

The narrowness of the *Kotch* case is emphasized by he fact that even in that case, there were four judges lissenting, who felt that the practice of giving prefernce to family members under a statute otherwise posibly valid on its face made the statute a deprivation of qual protection under the doctrine of *Yick Wo v. Hopins,* 118 U.S. 356.

Contrary to appellants' statement at page 27 of their rief, in the *Kotch* case the applicants were not necesarily friends or sons of existing pilots under the statute, or did the situation appear from the face of the statute, et the prevalence of nepotism aroused the dissent and he careful limitation of the majority opinion. In the resent case, decided unanimously by the three judges, wo of whom have spent their legal and judicial career n Alaska and of necessity are intimately familiar with he fishing industry, it was immediately apparent that he proposed gear licensing scheme would result in a rade guild controlled by present licensees and open only o their invitees.

When the practical application of the statute in creating a substantial fishing monopoly is compared with the ease with which the same objectives can be achieved by other methods, the "invidious discriminations" recognized by the court below becomes apparent. Invidious in this context is defined as "unjustly discriminatory" in Funk & Wagnalls and Webster's Dictionaries, 1966 edition.

The appellants cite *Corsa v. Tawes,* 149 F. Supp. 771, as authority to support the power of the legislation in the field of conservation. However, that case merely sustained the authority to abolish purse nets as a type of gear (similar to the abolishment of fish traps in Alaska) and did not pass on the issue of nonresidence because no controversy existed on this issue. In the present case, we are not concerned with the total abolishment of a type of gear but only with limiting the use of such gear to particular persons.

We therefore have a legislative finding of a problem (unsupported by the administrative body most closely involved) endeavoring to justify a program to restrict gear licenses by statute and regulations to prior licensees in each of 11 fishing areas as a means of curtailing the effort by in effect freezing the status quo with an illusory means of new entry. We submit that on the record this program is manifestly unfair and discriminatory and, considering the remoteness of the supposed benefit, the availability of alternatives, and the immediacy of its impact in prohibiting a heretofore existing right expressly recognized by the Alaska Constitution, is so unreasonable as to be in violation of the Fourteenth Amendment.

D. The District Court Properly Granted Appellees' Motion For Summary Judgment and There Was No Factual Issue to Be Adjudicated

The District Court found:

> "Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish the area." (A. 70-71)

Appellants contend that there is nothing in the record to support the above quoted conclusion of the court. (App. Br. p. 48).

As we have earlier demonstrated, this conclusion not only necessarily follows from the application of the various fishing laws and regulations, but the contention as to this fact was consistently made by appellees in their case before the District Court and was nowhere effectively refuted or challenged by the appellants. The trolling exception represents a minimal portion of the fishing effort and is not available in all areas. As to such areas, the court's finding is strictly true and, as to the other areas, it is substantially true at least for purposes of applying constitutional considerations.

The accuracy of the court's finding is established by the appellants' desperate statement at page 48 of their brief:

> "The court disregarded the fact that in order to fish for salmon under a commercial license one may fish without gear."

Appellants do not inform us as to how this could be done.

Appellants were well aware that this was appellees' posi-

tion. Thus, in the amended complaint at page 6 it is leged:

> "The provisions of Chapter 186 of the Laws Alaska, 1968, . . . are also . . . in contravention of aforequoted provisions of the Alaska Constituti to wit, Article I, Sections 1 and 7, and Article VI Sections 3, 15, and 17 and of Article I, Section Clause 3 and the Fourteenth Amendment, Sect 1 of the United States Constitution in that a right fishing gear licenses would be denied some app cants equally entitled thereto under the existing la and an absolute monopoly of gear licenses is grant to those previously licensed in the same area, or w have fished commercially in that area for someo else for three years. A special and exclusive right fishery is thereby granted on the sole basis of pri entitlement or employment by someone else wh prior entitlement."

In appellees' brief supporting its motion for summa judgment, dated January 18, 1969 at page 8, the arg ment was advanced:

> "Contrary to the defendants' assertion in some their argument that anyone can obtain a gear licen within three years by commercial fishing during th period, it should be pointed out that the possibili of obtaining such a gear license is wholly depende upon obtaining employment with some fisherma who holds a gear license during the three years i volved. If the gear licensees elected to limit emplo ment opportunities to their own families, friends townsfolk, the employment opportunity could b come very scarce. This is particularly true in th Bristol Bay Area where there is only one crewma working with each gear licensee. This factor w become even more critical as the value of the r strictive gear license makes it economically desirab for the licensees to limit the opportunity to othe to obtain such a license."

A hearing was held on the motion for summary jud

ment on February 14, 1969 and in oral argument for the first time, appellants contended that there might be some issue of fact as to whether "under this scheme entry into the salmon fishing industry is controlled not by the state, but by the local fishermen in each area who are eligible for gear licenses and choose among the commercial fishermen, if any, that they might wish to hire." (P. 22, Appellants' Statement quoting from Opinion of Court, App. VII of that Statement).

From the provisions of the law and regulations, such control over entry into the salmon fishing industry is abundantly clear. As has been indicated previously, there are two requirements before one may fish for salmon commercially in Alaska, to-wit:

1. An individual commercial fishing license; and
2. A commercial fishing gear license.

A person holding an individual commercial fishing license may only fish with licensed gear. 5 A.A.C. 39.120 (b)(1) of the general provisions of the Alaska Commercial Fishing Regulations of 1969 specifies:

> "No person may operate a net and vessel used to take salmon with such net unless the net and vessel are properly licensed . . . for the registration area selected . . ."

Section 16.05.540 Alaska Statutes specifies:

> "The fishing gear licenses . . . shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear."

Since a commercial fisherman is only able to fish by net in the area of his choice if he holds a fishing net gear license, it is obvious that such a person may not acquire

three years of fishing experience with net gear in the area unless he can persuade someone who has such a license to permit him to fish on the crew with that person.

> "Under Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, if all of the basic facts are undisputed and the matter is one of interpretation or the reaching of a conclusion by the court, the court may grant a motion for Summary Judgment."

Keele v. Union Pac. R. Co., 78 F.S. 678, 679 (D.C.S.D. Calif., 1948).

Even if it could be contended that there is some issue of fact pertaining to the control by the gear licensees of the entry into the commercial fishing industry under the law and regulations found by the United States District Court to be invalid, appellants may not raise such an alleged issue of fact at this time. Rule 5 H(2) of the General and Criminal Rules United States District Court for the District of Alaska, effective June 1, 1964 as amended March 1, 1967 specifies with reference to a motion for summary judgment:

> "(2) Any party opposing the motion shall, not later than three (3) days prior to the hearing, serve and file a *concise 'statement of genuine issues'* setting forth all material facts as to which it is contended there exists *a genuine issue necessary to be litigated.*" (Emphasis supplied)

Appellants never filed any "statement of genuine issues" and until oral argument, based their position entirely on the legal consequences of the laws and regulations here involved. It is not permissible for such issues to be raised now before the United States Supreme Court.

Should this learned court for any reason feel that a factual issue is involved with reference to the practical necessity of fishing with the owner of a gear license, the case could be remanded to the District Court for a hearing on this issue. It is respectfully submitted, however, that no factual issue remains to be resolved and that in any event appellants may not raise any such issue at this time.

CONCLUSION

The District Court's decision was sound, carefully considered and clearly correct on all issues. As the same result would be achieved if it was correct on either of the principal issues, there is no purpose served by remanding the case for further proceedings. If such a remand is directed, then the appellees should in any event be entitled to a continuation of their injunctive relief pending final determination.

DATED this 29th day of December, 1969.

Respectfully submitted,

FAULKNER, BANFIELD,
BOOCHEVER & DOOGAN
ROBERT BOOCHEVER
and
ALLEN, DEGARMO & LEEDY
SETH WARNER MORRISON, III
Attorneys for Appellees

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 185.—October Term, 1969

Augie Reetz, Commissioner of Fish and Game for Alaska, et al., Appellants, *v.* John Bozanich et al. | On Appeal From the United States District Court for the District of Alaska.

[February 25, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal from a three-judge District Court, convened under 28 U. S. C. §§ 2281, 2284, declaring certain fishing laws of Alaska and regulations under them unconstitutional and enjoining their enforcement. 297 F. Supp. 300. We noted probable jurisdiction. 396 U. S. 811.

The laws in question, passed in 1968, concern salmon net gear licenses for commercial fishing, not licenses for other types of salmon fishing. They are challenged because they limit licensees to a defined group of persons. The Act in material part provides: [1]

> "Persons eligible for gear licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

[1] Alaska Stat., § 16.05.536 (1968). Subd. (b) of that section specifies the data to be supplied in applications for a gear license. Section 16.05.540 provides that the licensee shall "personally operate or assist in the operation of the licensed fishing gear"; that he shall "personally own or lease the licensed fishing gear"; and that the license is "transferable."

"(1) has previously held a salmon net gear license for that specific salmon registration area; or

"(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The regulations [2] provide that except in cases of "extreme hardship [3] . . . a salmon net gear license for a specific salmon registration area may be issued only to a person who:

"(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

"(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

Appellees are nonresidents who applied for commercial salmon net gear licenses. They apparently are experienced net gear salmon fishermen but they cannot qualify for a salmon net gear license to fish in any of the 12 regions or areas described in the Act and the regulations.[4]

Appellees filed a motion for summary judgment on the grounds that the Act and regulation deprived them of their rights under the Equal Protection Clause of the Fourteenth Amendment and also their rights under the Alaska Constitution. That constitution provides in Art. VIII, § 3:

"Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

---

[2] Alaska Commercial Fishing Regulations § 102.09 (a) (1969).

[3] As defined in the regulations, *id.*, § 102.09 (a) (2).

[4] While the original complaint challenged the 1968 regulations, it was amended to challenge the 1968 Act and the 1969 regulations under it, which regulated the 1969 fishing season.

And it provides in Art. VIII, § 15:

> "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

Appellants filed a motion to dismiss or alternatively to stay the proceedings in the District Court pending the determination of the Alaska constitutional question by an Alaskan court.

Appellants' motion to dismiss or to stay was denied. Appellee's motion for summary judgment was granted, the three-judge District Court holding that the Act and regulations in question were unconstitutional both under the Equal Protection Clause of the Fourteenth Amendment and under the Constitution of Alaska. 297 F. Supp. 304–307.

This case is virtually on all fours with *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639, where a single district judge in construing a Mississippi statute held that it violated both the Federal and the State Constitutions. The Court of Appeals affirmed and we vacated its judgment and remanded to the District Court with directions to hold the case while the parties repaired to a state tribunal "for an authoritative declaration of applicable state law." *Id.*, at 640.

We said:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . That is especially desirable where the questions of state law are enmeshed with the federal questions. . . . Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. . . . In such a case, when the state court's interpretation of the

statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *Id.*, at 640–641.

We are advised that the provisions of the Alaska Constitution at issue have never been interpreted by an Alaska court. The District Court, feeling sure of its grounds on the merits, held, however, that this was not a proper case for abstention, saying that "if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable." 297 F. Supp., at 304. The three-judge panel was a distinguished one, two being former Alaska lawyers. And they felt that prompt decision was necessary to avoid the "grave and irreparable" injury to the "economic livelihood" of the appellees which would result, if they could not engage in their occupation "during this year's forthcoming fishing season." *Ibid.*

It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law, the classic case being *Meredith* v. *Winter Haven*, 320 U. S. 228, where federal jurisdiction was based on diversity only. Abstention certainly involves duplication of effort and expense and an attendant delay. See *England* v. *Louisiana State Board*, 375 U. S. 411. That is why we have said that this judicially created rule which stems from *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, should be applied only where "the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U. S. 528, 534. Moreover, we said in *Zwickler* v. *Koota*, 389 U. S. 241, 248, that abstention was applicable "only in narrowly limited 'special circumstances,'" citing *Propper* v. *Clark*, 337 U. S. 472, 492. In *Zwickler*, a state statute was attacked on the ground that on its face it was repugnant to the First Amendment; and it was con-

ceded that state court construction could not render unnecessary a decision of the First Amendment question. 389 U. S., at 250. A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship.

The *Pullman* doctrine was based on "the avoidance of needless friction" between federal pronouncements and state policies. 312 U. S., at 500. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution. The constitutional provision relates to fish resources, an asset unique in its abundance in Alaska. The statute and regulations relate to that same unique resource, the management of which is a matter of great state concern. We appreciate why the District Court felt concern over the effect of further delay on these plaintiffs, the appellees here; but we have concluded that the first judicial application of these constitutional provisions should properly be by an Alaska court.

We think the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions. We accordingly vacate the judgment of the District Court and remand the case for proceedings consistent with this opinion.

It is so ordered.